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## ***Bostock's Paradox: Textualism, Legal Justice, and the Constitution***

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## *Bostock's* Paradox: Textualism, Legal Justice, and the Constitution

### Erratum

Article updated 6/24/2021 to reflect the U.S. Supreme Court's decision in *Fulton*.

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## ***Bostock's Paradox: Textualism, Legal Justice, and the Constitution***

MARC SPINDELMAN<sup>†</sup>

### ABSTRACT

*The Supreme Court's opinion in Bostock v. Clayton County, Georgia—recognizing that anti-gay and anti-trans discrimination are forms of sex discrimination under Title VII of the 1964 Civil Rights Act—has already gained a steady reputation as a textualist statutory interpretation decision. The reality of the ruling is far more complicated than that. Bostock is a textualist decision, but, as the argument here shows, Bostock also offers a construction of Title VII's sex discrimination rule that sounds in a rule-of-law norm of legal justice about LGBT equality that itself traces roots to the Supreme Court's constitutional LGBT rights jurisprudence. Bostock's rule-of-law norm of legal justice, which expands and diffuses constitutional norms of LGBT equality in new ways, does more than shape Bostock's interpretation of Title VII. Through it, Bostock supplies state actors, including courts, with instruction on how to treat all claims of lesbian, gay, and now trans*

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<sup>†</sup> Isadore and Ida Topper Professor of Law, Michael E. Moritz College of Law, The Ohio State University. © Marc Spindelman, All Rights Reserved, 2021. Reprint requests should be sent to: mspindelman@gmail.com. Many thanks to Matt Birkhold, Cinnamon Carlane, Martha Chamallas, Doug Cole, Joshua Dressler, Brookes Hammock, Angela Harris, Deb Tuerkheimer, Ethan Weber, and Robin West for different forms of supportive engagement with earlier drafts. Thanks also to Marcus Andrews, Renier Halter-Rainey, Miles Sibley, Jesse Vogel, and Brittney Welch for various forms of research and editorial assistance, and to James Pfeiffer for distinctive help with different aspects of the notes and text. I am also indebted to Matt Cooper and Kaylie Vermillion, who came through, as always, with sharp help with sources, and to Kevin Hartnett, who went far above and beyond the ordinary call of editorial duty to bring this work to press.

*rights, whether they formally involve constitutional rights claims or, as in Bostock, do not. In Bostock's wake, state actors must ordinarily treat LGBT persons just the same as their cisheterosexual counterparts, affording them the same benefits of established and new legal protections that cisheterosexuals receive.*

*The path to this larger picture proceeds through an account that explains Bostock both is—and is not—a textualist decision. The opinion's textualist self-accounting, tracked in these pages, lacks normative justificatory punch on the central interpretive question raised by the claims it decides: whether Title VII's sex discrimination ban covers anti-gay and anti-trans discrimination. A careful reading of Bostock shows the opinion both disparaging and then ultimately embracing "extra-textual" reasons for choosing to read Title VII's sex discrimination rule in the pro-gay and pro-trans directions that it does.*

*The most telling of these reasons, in a dramatic turn, abandons the majority's textualist hunt, and reaches for a general, rule-of-law ideal of legal justice—a distinctive understanding of formal equality involving LGBT persons—that emerges from, and extends to new levels, the legal foundations of the U.S. Supreme Court's pro-lesbian and pro-gay constitutional rights jurisprudence, whose pro-trans legal implications are expressly recognized by the Supreme Court in Bostock for the first time. Bostock's announcement of the operations of legal justice in the case—a stylized extension of operative constitutional norms—has far-reaching implications for the interpretation of other statutes that may benefit LGBT persons, as well as other legal rules that, now or in the future, implicate LGBT rights.*

*Understanding how Bostock follows a line of justification found in the Supreme Court's constitutional promises of equal dignity and respect for lesbian women, gay men, and trans people frames an account of what is legally misguided about the textualist approaches taken up by the Bostock dissents. These opinions, which indulge both anti-gay and anti-trans sentiments as touchstones for their own preferred choices for how to read Title VII's sex discrimination ban, flout constitutional values that strip those choices of their own easy claims to legality. Having identified the legal flaws of the dissents' textualist analytics, discussion turns to the most significant of the likely reasons why the Bostock majority opinion does not expressly avow the constitutional and rule-of-law grounds for its decision. No matter, the recognition of Bostock's foundations in constitutionalism recasts the pressures the Supreme Court will face in future cases taking up questions that Bostock formally brackets, as well*

*as other wonders about its own text's meaning. With time, Bostock may prove to be an even bigger breakthrough for LGBT equality and rights under law than at first glance it seems.*

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*How wonderful that we have met with a paradox.  
Now we have some hope of making progress.  
—Niels Bohr<sup>1</sup>*

## INTRODUCTION

The Supreme Court's ruling in *Bostock v. Clayton County, Georgia*—holding that anti-gay and anti-trans discrimination are forms of sex discrimination under Title VII of the 1964 Civil Rights Act—has already gained notoriety as a textualist statutory interpretation ruling announcing Title VII's authoritative meaning based on its “plain” language alone.<sup>2</sup> *Bostock*'s truth is much more complicated, conflicted, and interesting than that. As the argument in these pages shows, *Bostock*

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1. RUTH MOORE, NIELS BOHR: THE MAN, HIS SCIENCE, & THE WORLD THEY CHANGED 196 (1966).

2. 42 U.S.C. § 2000e; *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1742 (2020). On *Bostock*'s textualism operating as a function of Title VII's plain language, see *id.* at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”); *id.* (“plain terms”); *id.* at 1748 (“plain terms”); *id.* at 1749 (discussing plain meaning in relation to defense arguments). For a few of the growing number of sources affirming *Bostock*'s textualism, see Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020) (describing the *Bostock* majority opinion as involving a kind of “formalistic textualism”); Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 6 (2020) (proposing that *Bostock* “provided the Court with an opportunity to prove the cynics wrong, and to show that it really does take its textualism seriously”); Nancy C. Marcus, *Bostock v. Clayton County and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223, 226 (figuring *Bostock* as “textualism-embracing . . . to an extreme”); George T. Conway III, *Why Scalia Should Have Loved the Supreme Court's Title VII Decision*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-have-loved-supreme-courts-title-vii-decision/> [https://perma.cc/XT5K-YE2K] (describing *Bostock* as a “victory for textualism in the interpretation of statutes”); Michael C. Dorf, *Does Justice Gorsuch's Magnificent Opinion in the Title VII Sexual Orientation and Gender Identity Cases Redeem Textualism?*, DORF ON LAW (June 16, 2020 11:46 AM), <http://www.dorf-onlaw.org/2020/06/does-justice-gorsuchs-magnificent.html> [https://perma.cc/MD3L-MZ8X] (characterizing *Bostock* as a “highly textualist opinion”); Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23AM), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/> [https://perma.cc/D433-DBGL] (describing *Bostock*'s textualism as a form of “progressive textualism”); Jonathan Skrmetti, *Symposium: The Triumph of Textualism: “Only the Written Word Is the Law”*, SCOTUSBLOG (June 15, 2020, 9:04PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/> [https://perma.cc/NW5U-GG7S] (commenting that “the three *Bostock* opinions are a master class in defining and applying textualism”); Ezra Ishmael Young, *Bostock is a Textualist Triumph*, JURIST (June 25, 2020, 3:53PM), <https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/> [https://perma.cc/8Y6V-GRCC] (calling *Bostock* “a win for principled textualists of all political persuasions”).

is, in a way, the straightforward textualist statutory interpretation decision it claims to be—but it is also not that. Along with *Bostock*'s self-professed textualism is an account of its interpretive conclusion that ultimately looks beyond Title VII's text to a rule-of-law ideal of legal justice.<sup>3</sup> This legal justice ideal—which speaks with precision to the formal equality that lesbian women, gay men, and trans people are as a rule now to receive in our rule-of-law system, equal to their cisheterosexual counterparts—emerges from, and is finally justified by, the Supreme Court's pro-LGBT constitutional rights jurisprudence. For the first time ever, *Bostock* explicitly extends the Court's earlier legal protections for lesbian women and gay men to trans people as well.<sup>4</sup> *Bostock* announces that all these individuals now “are entitled to the benefit[s] of the law's terms”—benefits that begin in this case with Title VII's sex discrimination protections, but that, by virtue of *Bostock*'s configurations, also include equal legal protections in a much wider sense.<sup>5</sup>

*Bostock* and its dueling textualisms—the textualist thrusts of the majority opinion that are met by the textualist parries of the dissents—illustrate textualism's deep and inescapable methodological indeterminacy.<sup>6</sup> No matter what *Bostock* says for itself, it cannot be the

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3. See ROBIN WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE-OF-LAW NORMATIVE JURISPRUDENCE 107 (2003) (tying the idea of legal justice to the “basic ideal of formal equality,” the ideal “that likes should be treated alike”); see also *id.* at 1–11 (discussing “legal justice”). For some relevant context on the wider “[l]egal-[a]cademic [r]ule of [l]aw [d]ebate” within which the ideal of legal justice surfaces, see *id.* at 18–26.

4. For one notation of the pro-trans implications of the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), see Kylar W. Broadus, *The Legal Status of Transgender Relationships*, GPSOLO, Jan./Feb. 2017, at 23, 23–25 (describing how *Obergefell* “removed the question of whether someone is ‘biologically’ a man or a woman” from the constitutional analysis of the right to marry).

5. *Bostock*, 140 S. Ct. at 1751.

6. Accord John Vlahoplus, Bostock, Zarda, and R.G. & G.R. Harris Funeral Homes: Affirming Equality and Challenging Textualism, GEO. WASH. L. REV. ON THE DOCKET (June 18, 2020), <https://www.gwlr.org/bostock-zarda-harris-funeral-homes-affirming-equality-and-challenging-textualism/> [https://perma.cc/Z5ZV-KSXH] (“Ultimately, the Justices’ dueling visions undermine textualism as an independent interpretive theory. If the Justices cannot agree on the meaning of ‘because of sex’ in a statute enacted or amended in their lifetimes, then it is difficult to conclude that textualism can resolve legal disputes.”). Textualism's indeterminacy problems involve the problems of legal indeterminacy famously explored within the Critical Legal Studies movement. For a few examples of work in that tradition, see James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 703 n.54 (1985) (describing “the legal system's need for

pure product of the textualist method of statutory interpretation that it maintains, as though its interpretive conclusions were wholly divorced from substantive, extra-textual values that ground the opinion's results. This helps explain why *Bostock* bears the traces of honest struggles with its professed textualist methodology, showing signs of internal doubts about it. On close inspection, *Bostock*'s relation to textualism is far less doctrinaire than its confident self-presentation superficially suggests.

One way to make sense of *Bostock*'s underlying textual struggles is to understand them as the residue of the lingering anxieties, if not doubts, that Justice Neil Gorsuch, its named author, has about what the opinion does, behind the confident rhetorical posture that the opinion regularly adopts. During oral arguments in *R.G. and G.R. Harris Funeral Homes v. EEOC*, one of the cases that *Bostock* collects, Justice Gorsuch candidly and repeatedly voiced reservations about the "drastic . . . change"—or, as he later put it, "the massive social upheaval"—that a decision like the one he winds up writing for the Supreme Court might yield.<sup>7</sup> Unremarkably,

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neutrality" as "premised on the unstable, conflicting, and indeterminate nature of non-legal value judgments"); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997, 1007–08 (1984) (discussing the Derridian underpinnings of the critical analytic that the work develops and deploys to show the limits of doctrine as a determinate force); Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, in THE RULE-OF-LAW: IDEAL OR IDEOLOGY 141, 164–65 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (discussing the indeterminacy thesis and its relation to interpretive practice and experience); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1160–61 n.6 (1985) (discussing Derrida and the deconstructive dimensions of the indeterminacy thesis); *id.* at 1181 ("The insights of linguistic and literary theory can be applied to legal practice by demonstrating the indeterminacy inhering in legal texts, taking the term 'texts' in its commonsense meaning. . . . Such applications debunk the claims that legal interpretation is ruled by objective, determinate meaning residing in a written text."); Gary Peller, *Debates About Theory Within Critical Legal Studies*, 1 LIZARD 3–4 (1984), <https://legalleft.org/wp-content/uploads/sites/11/2015/11/Lizard-no-1.pdf> [<https://perma.cc/JK37-ZH8M>] (discussing the connection between irrationalism and indeterminacy); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 9–25 (1984) (discussing determinacy). *See also* Tor Krever, Carl Lisberger & Max Utzschneider, *Law on the Left: A Conversation with Duncan Kennedy*, 10 UNBOUND: HARV. J. LEGAL LEFT 1, 26–28 (2015), <https://legalleft.org/wp-content/uploads/sites/11/2015/11/Krever-Formatted.pdf> [<https://perma.cc/G44P-NWMJ>] (discussing Duncan Kennedy's work on indeterminacy and its reception by different audiences). For a still-classic response, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Although I am generally simpatico with the insights of a number of forms of the indeterminacy thesis, I do not mount a critique of *Bostock* that expressly builds on it here, partly given the ways that *Bostock* turns out not to be the perfect specimen of textualism that it boasts and that many of its readers have seemed sure that they, too, see in the opinion. *See, e.g., supra* note 2 (collecting sources).

7. Transcript of Oral Argument at 24, 26, *R.G. & G.R. Harris Funeral Homes, Inc. v.*



*Bostock* does not openly herald these allegedly socially destabilizing prospects.<sup>8</sup> Rather, it strategically manages them by deferring certain questions—including questions about showers and locker rooms the defense raised—that make it unnecessary for now for the Court to announce more culturally charged legal conclusions involving, in particular, trans sex discrimination rights.<sup>9</sup> At the same time, *Bostock*'s decision to look beyond the four corners of Title VII's text to a principle of legal justice to justify its construction of Title VII's meaning shows a felt need within the opinion, whether conscious or not, for a deeper and more secure, values-based explanation in the case than the opinion's textualist account achieves.

The new ground this Article stakes out amidst discussions of *Bostock*'s meaning does not pretend novelty as to its key intuition, which other readers of *Bostock* have also had in relation to the case: There is something happening in *Bostock* beyond the textualism that at first appears—something that is *somehow* a function of the Supreme Court's pre-*Bostock* constitutional rulings vindicating lesbian and gay rights.<sup>10</sup> An important element of the present work is to detail the contact points that affirm the thought that *Bostock* is in important ways a consequence—and

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EEOC, 139 S. Ct. 1599 (2019) (No. 18-107), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_4gcj.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf) [<https://perma.cc/CZ2G-EZJV>] [hereinafter Harris Funeral Homes Transcript] (statement of Justice Neil Gorsuch).

8. Allegedly for the sorts of reasons that David Cole offered to the Supreme Court during oral arguments in *Harris Funeral Homes*: “There’s been no upheaval” even as “federal courts of appeals have been recognizing that discrimination against transgender people is sex discrimination for 20 years.” *Id.* at 27 (answer by David D. Cole).

9. For critical engagements with the *Bostock* litigation, see Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I*, 81 OHIO ST. L.J. ONLINE 81 (2020) [hereinafter Spindelman, *The Shower's Return: Part I*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87 (2020) [hereinafter Spindelman, *The Shower's Return: Part II*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101 (2020) [hereinafter Spindelman, *The Shower's Return: Part III*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV*, 81 OHIO ST. L.J. ONLINE 117 (2020); Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part V*, 81 OHIO ST. L.J. ONLINE 133 (2020) [hereinafter Spindelman, *The Shower's Return: Part V*]; Marc Spindelman, *The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part VI*, 81 OHIO ST. L.J. ONLINE 153 (2020) [hereinafter Spindelman, *The Shower's Return: Part VI*].

10. See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

justified and justifiable as a consequence—of the Supreme Court’s pro-LGBT constitutional rights jurisprudence. The argument here specifies how the Court’s constitutional pro-LGBT rights jurisprudence provides positive-law content to the rule-of-law norm of legal justice that structures the Court’s *Bostock* opinion, yielding a ruling advancing a rule-of-law ideal of legal justice that governmental actors, including courts, must heed in the full run of cases involving LGBT rights—even where, as in *Bostock* itself, no formal claim of constitutional right is involved.<sup>11</sup>

By means of its announcement of a rule of legal justice that draws legal authority from the Court’s pro-LGBT constitutional right jurisprudence, *Bostock* normalizes the constitutional promises of equal dignity and respect that LGBT people deserve in ways that expand and entrench those promises as part of the ordinary, day-to-day experiences of rule-of-law-governed life in the United States, part of its standard fresh air—air that circulates in the Court’s opinion in the case.<sup>12</sup> The present undertaking thus brings a widely sensed intuition about the law of the case to legal life in a way that gives differently situated legal actors direct, operative access to it as they undertake the work of wrestling with and respecting *Bostock* as the legal authority that it is.<sup>13</sup> Among other things, recognizing *Bostock*’s underlying constitutional law and rule-of-law dimensions widens the range of legal meanings that *Bostock* carries and conveys. This new decision is a powerful legal signifier of a vibrant, if not unlimited, array of LGBT legal rights—more powerful and significant certainly than accounts of the ruling as a mere textualist statutory interpretation ruling could properly think.

*Bostock* nowhere explicitly declares its own jurisprudential indebtedness to the Court’s pro-LGBT constitutional rights decisions. Indeed, *Bostock* meticulously avoids direct textual citation, much less engaged discussion, of the major Supreme Court pro-LGBT rights

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11. See *supra* note 3.

12. Cf. *Romer*, 517 U.S. at 631 (“These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”).

13. In this respect, the work provides a justification for the through-line from *Bostock* to pro-LGBT governmental actions, including judicial decisions, that have arrived in its wake, see *infra* notes 180, 182, even as it frames a series of anti-trans measures since *Bostock* as inconsistent with both constitutional and rule-of-law principles. See, e.g., David Crary, *No Big Backlash for States Passing Anti-transgender Laws*, APNEWS.COM (Apr. 27, 2021), <https://apnews.com/article/us-news-health-laws-legislature-bills-5726fdeb8a5e7cf2c89a4a2d176e8a7f> [https://perma.cc/X62H-KZNP].

rulings. Reverberation from those decisions, however, including the guarantee that the constitutional right to marry includes the right to same-sex marriage, are felt and can be seen in the decision. The image of workers, in fact, “model” workers, in same-sex marriages is woven into the opinion’s text, which looks to them to help explain why sexual orientation discrimination is sex discrimination.<sup>14</sup> Subtle, casual, and in-plain-sight notations like this function as in-passing, approving, if unconventional, nods to the legal and social effects of the Court’s constitutional pro-LGBT rights caselaw. Even more significant is how these nods are replicated in the deep structure of the *Bostock* opinion’s text and its approach to LGBT statutory rights.

*Bostock*’s studied evasion of the relevant constitutional caselaw conduces to its crisp self-presentation as a textualist statutory interpretation ruling, one that eschews reliance on any non-statutory sources of interpretive judgment, the express invocation of which would mar the opinion’s high-gloss textualist finish. Despite *Bostock*’s painstaking care on this front, the Supreme Court’s pro-LGBT rights jurisprudence figures in the opinion in important ways. This jurisprudence is the elephant in the textual room—found, as it happens, in an important textual “mousehole”—no matter how many of *Bostock*’s readers, for different reasons, have chosen and may continue to choose to ignore it while crediting the opinion’s textualist self-definition.<sup>15</sup>

To be clear, nothing in what follows seeks to deny that Justice Gorsuch is sincerely committed to textualism as a normative practice of statutory interpretation. Rather, recognizing that Justice Gorsuch is a textualist supplies the background for tracing the ways that *Bostock* bears a difficult form of witness to how a committed textualist may still expose this interpretive method as wanting, and that, standing alone, it may not provide an adequate public justification for the interpretive choices that a particular decision, like *Bostock*, involves.<sup>16</sup> This is part of what makes *Bostock* so fascinating as a text—and worth digging into in depth.

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14. *Bostock*, 140 S. Ct. at 1742 (“A model employee arrives and introduces a manager to Susan, the employee’s wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.”).

15. *Id.* at 1753 (“[T]he employers . . . cannot hide behind the no-elephants-in-mouseholes canon. . . . We can’t deny that today’s holding . . . is an elephant. But where’s the mousehole? . . . This elephant has never hidden in a mousehole; it has been standing before us all along.”).

16. See *infra* note 40. On public justification, see generally, for example, John Rawls, *The Idea of Public Reason Revisited*, 64 CHI. L. REV. 765 (1997).

Here is a roadmap for the discussion that follows.

Part I formally begins by giving an account of *Bostock*'s textualist approach to determining the meaning of Title VII's sex discrimination ban and its position that lesbian woman, gay men, and trans people are all within the ambit of its antidiscrimination protections.

Part II spotlights significant moments in the *Bostock* opinion where it openly grapples with how much of an extra-textualist account for its conclusion it wishes to provide. Of the passages engaged in this Part, the most impactful involves the opinion reaching for an extra-textualist source of interpretive judgment: an undefined vision of justice that is ultimately identified as a rule-of-law ideal of legal justice that draws heavily from the Supreme Court's pro-LGBT rights jurisprudence. This does not make *Bostock* a constitutional decision, but, rather, one that announces a broad rule-of-law principle that is to be applied in a range of cases, whether a constitutional claim is involved in them, or—as in *Bostock*—not. In this respect, *Bostock* leverages constitutional ideals and corresponding notions of constitutional justice into the rule-of-law domain via its legal justice ideal.<sup>17</sup> *Bostock* does much more than simply mirror the plain meaning of statutory text.<sup>18</sup>

Part III shifts focus away from the *Bostock* majority opinion and onto the *Bostock* dissents, giving them—and the charges of lawlessness and illegitimacy that they level against the majority opinion—a close and critical look. This Part also wrestles with the question of why *Bostock* does not simply announce that it means to embrace the constitutional roots underlying its rule-of-law legal justice ideal if this is what the opinion means to do. Considering a range of legal questions that *Bostock* effectively tees up, including conflicts between LGBT rights claims and rights claims advanced by faithful conservatives and traditional moralists, this Part reaffirms in a different way that *Bostock* may, in time, show itself to be a bigger win for LGBT rights than it is presently generally understood to be.

The Conclusion takes a step back from the various details of the argument to offer some final reflections on the paradoxicality, internal rivenness, and the messiness of the Court's *Bostock* opinion. It ventures a pitch for not indulging the urge to try, conceptually, to clean it up,

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17. For movements in these directions, see sources cited *infra* notes 180, 182.

18. *Bostock*, 140 S. Ct. at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”).

understanding both the beauty of the opinion in its current state, along with its potential jurisgenerativity for future claims involving LGBTQIA+ rights, which may themselves be messily queer in conventional category-defying ways.

### I. BOSTOCK'S TEXTUALISM

First, then, *Bostock*'s textualism. Three moves from the text of Title VII lift *Bostock* off the ground.

Move one is a basically conservative biological definition of "sex."<sup>19</sup> The *Bostock* Court's opinion invokes defense arguments "[a]ppealing to roughly contemporaneous dictionaries" in which "the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology.'"<sup>20</sup> Commenting that "the employees concede the point for argument's sake," *Bostock* says it will "proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."<sup>21</sup>

Move two involves Title VII's expression "because of," as in "'because of' sex," which delimits the range of sex discrimination cases that Title VII outlaws.<sup>22</sup> Here, the *Bostock* opinion's structure makes it seem as though it is generating its own understanding of "because of" directly from Title VII's text. A look at how the discussion unfolds, however, indicates that *Bostock* is punctuated by citations to Supreme Court gloss on Title VII's text. Citing Title VII caselaw, *Bostock* says "because of" means "simple" and "traditional" but-for cause.<sup>23</sup>

19. *Id.* at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."). For similar ideas in the *Bostock* dissents, see *id.* at 1767 (Alito, J., dissenting) ("In 1964, . . . [t]he ordinary meaning of discrimination because of 'sex' was discrimination because of a person's biological sex . . . ."); *id.* at 1828 (Kavanaugh, J., dissenting) (discussing the "ordinary meaning of the phrase 'discriminate because of sex'"). For critical engagement of some of the pro-trans arguments from "sex" in the litigation that resulted in *Bostock*, see Young, *supra* note 9, at 27–37.

20. *Bostock*, 140 S. Ct. at 1739 (majority opinion). For some historical perspective not noted by *Bostock* on the treatment of homosexuality in Washington, D.C., in 1964, see generally Lee Edelman, *Tearooms and Sympathy, or, the Epistemology of the Water Closet*, in *THE LESBIAN AND GAY STUDIES READER* 553 (Henry Abelove et al. eds., 1993).

21. *Bostock*, 140 S. Ct. at 1739.

22. *Id.* ("The question isn't just what 'sex' meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions 'because of' sex.").

23. *Id.* (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 360 (2013)).

Continuing: “That form of causation is established whenever a particular outcome would not have happened ‘but for’ the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”<sup>24</sup> Notably, none of the citations supporting this view is expressly heralded by *Bostock* for its textualist commitments. This is perhaps the first sign in the opinion, subtle though it is, indicating that judicial precedent is doing meaningful work at *Bostock*’s ostensibly textualist foundations.<sup>25</sup>

Move three takes up the meaning of “discrimination” under Title VII.<sup>26</sup> On this front, *Bostock* emphasizes that “discrimination” is not mere differentiation, but differentially unfavorable treatment, and more exactly, worse treatment as compared to others.<sup>27</sup> Leaning on *Webster’s New International Dictionary* (2d ed. 1954), *Bostock* explains that: “To ‘discriminate against’ a person, then, would seem to mean treating that individual worse than others who are similarly situated.”<sup>28</sup> This discrimination against an individual, which accords with what the opinion figures as Title VII’s focus on individuals and not groups, must also, according to the precedent that *Bostock* invokes, “be intentional.”<sup>29</sup> As to Title VII’s focus on the individual, *Bostock* is emphatic—and repeatedly

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24. *Id.* (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

25. *See id.* (explaining Title VII’s causation rule and quoting and citing Supreme Court authority). In this respect, judicial precedent doing this work in *Bostock* may help explain why *Bostock* describes Title VII’s sex discrimination ban’s meaning not only as “plain,” but also as “settled.” *Id.* at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”). Nelson Lund drills down on the gap between the statutory term “because of” and the meaning *Bostock* gives it in Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 *FEDERALIST SOC’Y REV.* 176, 180 (2020) (insisting, after noting that *Bostock* “says that ‘in the language of law’ the term ‘because of X’ can *only* mean ‘X was a but-for cause of,’” that “*the text of the statute says no such thing*[, a]nd Gorsuch points to nothing in the statute that implies or even suggests any such thing”). Lund’s observations spotlight from a different angle the work that precedent is doing at just this point in *Bostock*’s text.

26. *Bostock*, 140 S. Ct. at 1740.

27. *Id.*

28. *Id.*

29. The quoted language comes from *id.* (“In so-called ‘disparate treatment’ cases like today’s, this Court has also held that the difference in treatment based on sex must be intentional.” (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988))). For more extended discussion of the individual-based versus group-based interpretation of the statute, see *id.* at 1740–41 (recognizing the prospect of a group-based understanding of the statute, but, with repeated reference to Title VII’s text, decisively rejecting it in favor of an individual-rights-based reading).

so. It underscores that the statute “tells us three times—including immediately after the words ‘discriminate against’—that our focus should be on individuals, not groups.”<sup>30</sup> After detailing those three expressions, *Bostock* goes on to say—quoting from the same dictionary as before—that “the meaning of ‘individual’ was as uncontroversial in 1964 as it is today: ‘A particular being as distinguished from a class, species, or collection.’”<sup>31</sup>

Moves one, two, and three in place, *Bostock* stacks them together to produce an operative Title VII sex discrimination rule. “So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”<sup>32</sup>

This being the relevant rule, *Bostock* proceeds to apply it to anti-gay and anti-trans discrimination, which it categorically holds to be unlawful sex discrimination under Title VII.<sup>33</sup> With some mechanical details set forth quite clearly, *Bostock* explains:

The statute’s message for our cases is . . . simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth,

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30. *Id.* at 1740.

31. *Id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 1267 (2d ed. 1954). For moments during oral arguments when this idea took center stage, see Harris Funeral Homes Transcript, *supra* note 7, at 39 (“JUSTICE KAGAN: . . . Mr. Bursch, . . . [y]ou’re making Title VII into a statute about groups but Title VII is not a statute about groups.”); *see also id.* at 40–44 (providing additional discussion of the individual versus group-based understanding of Title VII). Talk later in *Bostock* about “disfavored group[s]” raises different possibilities. *See Bostock*, 140 S. Ct. at 1751. *See infra* Part II.A.3.

32. *Bostock*, 140 S. Ct. at 1740.

33. *Id.* at 1741–43.

the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.<sup>34</sup>

This is the crux of *Bostock*'s textualist account of Title VII's sex discrimination ban. Notice how it rounds the bases without departing—or too obviously departing—from Title VII's text.<sup>35</sup> Without insisting on textualist perfection, *Bostock* may broadly be thought a textualist decision in this respect.

## II. *BOSTOCK*'S TEXTUALISM RECONSIDERED

If *Bostock*'s textualist reasoning feels thin and dissatisfying to you, you are not alone. The dissents said it first. From their own textualist grounds, the dissents announce they are unpersuaded, if not exactly unmoved.<sup>36</sup> Justice Samuel Alito's dissent aggressively—and angrily—characterizes *Bostock* as fake, lousy, “pirate” textualism that involves the Court in the illegitimate business of legislating from the Bench.<sup>37</sup> Devoid

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34. *Id.* at 1741–42.

35. The qualification is to recognize the opinion's reliance on precedent in making its early points. The foundations for a different perspective may emerge from views like those that Justice Clarence Thomas recently expressed in *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (“In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.”); *id.* at 1984 (“Federal courts may (but need not) adhere to an incorrect decision as precedent, but only when traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law.”). See also *supra* note 25 (noting Nelson Lund's views).

36. For a relevant account of the need for justification addressed to those who are subject to *Bostock*'s rule, see Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1025 (2014) (“For a law to be general, . . . it must be justifiable by public reasons, understood as an expressive idea . . . . To be justifiable by public reasons is to be justifiable by reasons that each person affected by the law can reasonably accept, conceiving of him or herself as an equal member of the political community.”). For additional discussion, see PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 33 (2016) (“[C]oercing someone based on reasons that at least have the potential to count as reasons *for her*, rather than simply determining her fate based on the idiosyncratic reasons of the decision maker, expresses respect for her status as an agent to whom justification is owed for what is done to her.”).

37. *Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting) (“The Court's opinion is like a pirate ship. It sails under a textualist flag, but . . . actually represents . . . the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.” (citation omitted)); *id.* at 1754 (“There is only one word for what the Court has done today:



of the same intensity, Justice Brett Kavanaugh's dissent agrees that the majority's textualist method is improper, because of its law-giving, as opposed to its own law-interpreting, results.<sup>38</sup>

The dissents hit the mark in important respects. *Bostock* is "wooden," "literal," and formalistic.<sup>39</sup> Its textualist account of its results is analytically thin.<sup>40</sup> On its own, *Bostock*'s textualist tally of itself does

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legislation."). For a taste of some of the language in Justice Alito's dissent suggesting its rhetorical aggression and anger, see, for example, *id.* at 1755 ("A more brazen abuse of our authority to interpret statutes is hard to recall."); *id.* ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous."); *id.* at 1757 ("The arrogance of this argument is breathtaking."); *id.* at 1759 ("The Court follows this strange hypothetical with an even stranger argument."); *id.* at 1772 ("To call this evidence merely feeble would be generous."); *id.* ("While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of 'transgender status' or 'gender identity,' terms that would have left people at the time scratching their heads."); *id.* at 1775 ("The Court's extensive discussion of causation standards is so much smoke.").

38. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) ("[C]ourts must follow ordinary meaning, not literal meaning. . . . As Justice Scalia explained, 'the good textualist is not a literalist.'" (citation omitted)); *id.* at 1836 ("In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand.").

39. *Id.* at 1745 (majority opinion) ("You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal."); *id.* at 1834 (Kavanaugh, J., dissenting) ("[T]he majority opinion achieves the same outcome ['judicially updating or amending Title VII'] by seizing on literal meaning and overlooking the ordinary meaning of the phrase 'discriminate because of sex.'").

40. Others have noted *Bostock*'s textualism and its weakness. See, e.g., Dorf, *supra* note 2 (affirming *Bostock* as a "highly textualist opinion," and praising the opinion, while indicating "it would have been . . . child's play to write an equally or more persuasive opinion in a purposivist style," along lines indicating "that discrimination on the basis of sexual orientation or gender identity is sex-role stereotyping"); Michael C. Dorf, *Will Liberal Justices Pay A Price For Signing Onto Justice Gorsuch's Textualist Opinions?*, DORF ON LAW (July 22, 2020), <http://www.dorfonlaw.org/2020/07/will-liberal-justices-pay-price-for.html> [<https://perma.cc/LBR7-BZ4G>] (noting argument by Eric Segall to the effect that "the conventional legal materials (text, history, precedent) are so under-determinate that one pretty much must look to extra-legal causes for any jurist's decision," and "object[ing]" again "to the extreme textualism of the opinion's style," while venturing that the opinion "would have been stronger if it had explained why discrimination based on gender identity or sexual orientation does not merely count as sex discrimination as a formal matter but that both gender identity discrimination and sexual orientation discrimination are rooted in pernicious sex-role stereotyping, which is the central evil that the prohibition on sex discrimination combats"); Eric Segall, *A Different View About Chief Justice Roberts and this Year's Term: The Return of O'Connorism*, DORF ON LAW (July 17, 2020), <http://www.dorfonlaw.org/2020/07/a-different-view-about-chief-justice.html> [<https://perma.cc/2SQB-PBJL>] ("So-called rigid textualism didn't require or in my opinion even lead to the result. Cases about equality almost

not persuasively explain why *Bostock* has made the interpretive choice to read Title VII's sex discrimination ban categorically as encompassing both anti-gay and anti-trans discrimination.

This is not surprising. *Bostock*'s self-representation positions the decision as one that dutifully follows Congress's lead, without indulging its own preferences. It thus needs no justification for its interpretive conclusion beyond that. Viewed more critically, *Bostock*'s textualist logic at most establishes that its interpretation of Title VII may be squared with the language of Title VII's sex discrimination ban. The problem with this position, however, as the defense arguments in the case and the dissents' positions illustrate, is that *Bostock* involves an interpretive choice—even within textualism itself. *Bostock*'s reading of Title VII's text is not the only possible interpretive—even the only possible textualist interpretive—route.

Given *Bostock*'s confidence in its textualism, it is a welcome turn-about when the opinion acknowledges its own thinness by proceeding to thicken its textualist explanation of itself. If the opinion's rhetoric is at times palpably Kingsfieldian—particularly when it dismissively defends its textualism against defense positions through its own forward-leaning attacks—it is amidst its larger defense of itself that *Bostock* indicates there is more to its bottom line than the text of Title VII alone.<sup>41</sup> *Bostock*

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always implicate values all the way down. The most that should be said is that in this case, for most of us (meaning the American people), six of nine Justices held the right values.") Vlahoplus, *supra* note 6 ("Ultimately, the Justices' dueling visions undermine textualism as an independent interpretive theory."). Compare Lund, *supra* note 25, at 176–78, 180 (flagging *Bostock*'s self-presentation as "cast[ing] . . . [itself] as the true intellectual successor to . . . the high priest of statutory textualism, Justice Antonin Scalia," but then proposing that *Bostock*'s "analytical approach resembles a theory known as 'living originalism,'" which *Bostock* takes "beyond the academy, beyond the field of constitutional law, and even beyond the limits recognized by its academic adherents," into what is described as "living textualism," likened to the idea of "living literalism" described by Justice Brett Kavanaugh's *Bostock* dissent), with *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring) ("[I]nterpretation can mean giving a fresh meaning to a statement . . . a meaning that infuses the statement with vitality and significance today."), and William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479, 1481 (1987) (setting forth an argument that "[s]tatutes . . . should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context," and situating the argument in the context of a "functioning representative democracy" within which "the legislature is the primary lawmaking body," while arguing for the "advantages of the proposed model of dynamic statutory interpretation over other current approaches to statutory interpretation").

41. For Kingsfield, see THE PAPER CHASE 1:36:46 (Twentieth Century Fox 1973) (Kingsfield: "Mister Hart, here is a dime. Call your mother. Tell her there is serious doubt about your becoming a lawyer."). For illustrations of the opinion going on the offensive, see

does not showcase these points or perform them didactically, but it ventilates their terms in variegated ways that bury the ledes that they announce. This is doubtless partly a function of the fact that the more *Bostock* expressly locates its own reasons and values in sources of judgment or justifications beyond Title VII's text, the more the opinion compromises the high gloss of its claimed, exclusively textualist finish. Still, at certain moments, *Bostock* veers away from textualist claim-making, and, in one stunning tell, eventually abandons its textualism more or less entirely.

Amidst this rupture of its textualist method, *Bostock*—almost despite itself—points the way toward seeing and accounting for its own truth, as well as the deeply legally problematic normativity of the dissents, in extra-textualist terms. *Bostock*'s temporary abandonment of textualism does not make it illegitimate or lawless in the ways the dissents charge, nor, for that matter, as its own textualist commitments might be thought to indicate.<sup>42</sup> To the contrary, *Bostock*'s reliance on extra-textual grounds to justify its interpretation of Title VII points to the decision's deep reservoir of legal strengths and how far the opinion practically extends the lessons of caselaw that it does not directly cite or discuss in conventionally recognizable terms. If it is easy to resist cranking up the anti-textualist volume at this point—insisting on what textualism's shortcomings look like—the reason is that *Bostock*'s analytics themselves make the case that, within the four corners of its own text, *Bostock* is defined by paradox. It both is—and is not—a textualist text.

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*infra* Parts II.A.1, II.A.2.

42. For the dissents' charges, see, for example, *Bostock*, 140 S. Ct. at 1755–56, 1784 (Alito, J., dissenting) (characterizing the opinion as “sail[ing] under a textualist flag,” while indicating that it “actually” involves the Court in the project of “‘updat[ing]’ old statutes,” an undertaking that exceeds the limited “authority of this Court . . . [to] say[] what the law is”); *id.* at 1824 (Kavanaugh, J., dissenting) (venturing that, because the majority has embraced a literal over an ordinary meaning of the expression “discriminate because of sex,” it has moved onto grounds of “rewrit[ing] the law simply because of . . . [judicial] policy views”—grounds that threaten the rule-of-law and the value of democratic accountability, turning “the Judiciary [into] a democratically illegitimate super-legislature”). For the idea operating within the majority opinion itself, see *id.* at 1737–38 (majority opinion) (noting the illegitimacy of resort to “extratextual considerations” “[w]hen the express terms of a statute” provide the answer, and commenting that the judicial reliance on such “extratextual considerations” “risk[s] amending statutes outside the legislative process reserved for the people’s representatives”).

### A. Three Textual Recognitions

There are at least three textual moments in *Bostock*'s larger discussion of, and engagement with, defense arguments in the case that show *Bostock* grappling with and effectively exceeding the limits of its own professed textualism. As a matter of sequencing, these textual moments arrive after *Bostock* has offered its own textualist self-account and holding.<sup>43</sup>

#### 1. Passage One: Denying “[D]onut [H]oles”<sup>44</sup>

In the first passage, *Bostock* is pressing back against the notion that it has lawlessly conflated sex, sexual orientation, and trans discrimination when figuring the meaning and scope of Title VII's sex discrimination ban.<sup>45</sup> *Bostock* responds that it understands perfectly well that “homosexuality and transgender status are distinct concepts from sex.”<sup>46</sup> Its ruling that anti-gay and anti-trans discrimination “necessarily” and “unmistakabl[y]”—and hence categorically—involve sex discrimination is beset by no confusion about who is who or what is what with these different terms and what they mean.<sup>47</sup> “Sex” discrimination is the grand,

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43. This account puts to one side *Bostock*'s treatment of three major sex discrimination cases that it says confirm its textualist first-principles account of Title VII's sex discrimination ban, *id.* at 1743–44 (discussing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), *Los Angeles Department of Water and Power v. Manhart*, 425 U.S. 702 (1978), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)), though a close reading of this discussion might, like the examples discussed in the text, show how the *Bostock* Court actually derives its interpretation of Title VII and its rules not simply from the statute, but through the relevant Title VII caselaw, which might have been threatened by, or appeared to have been threatened by, a contrary result in the case. Because this point is crisply made later in the *Bostock* Court's opinion, and requires less excavation to get to it, that is where the point lives. Still, the *Bostock* Court's focus on legal doctrine, and so, however tacitly, principles of stare decisis, is important in ways that will become clearer as part of the discussion of the three passages from *Bostock* that are treated in the text. See *infra* Parts II.A.1–3, II.B.

44. *Bostock*, 140 S. Ct. at 1747.

45. The passage appears in *id.* at 1746–47.

46. *Id.*

47. *Id.* at 1747 (“But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”); *id.* at 1741–42 (the term is “unmistakable” in the original); see also *id.* at 1778 (Alito, J., dissenting) (describing the majority as “intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex”); Larry Rohter, *Off Base, Many Sailors Voice Anger Toward Homosexuals*, N.Y. TIMES (Jan. 31, 1993), <https://www.nytimes.com/1993/01/31/us/the-gay-troop-issue-off-base-many-sailors-voice-anger-toward-homosexuals.html> [https://perma.cc/ZGL7-YZUQ] (quoting “a 32-year-old tugboat master” observing, in

operative statutory category under which sexual orientation and trans discrimination “necessarily” fall as subcategories given the operation of Title VII’s “but for” sex discrimination rules.<sup>48</sup> There being, as the opinion memorably says, no “such thing as a ‘canon of donut holes,’ in which Congress’s failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception,” “courts apply the broad rule” “when Congress chooses not to include any exceptions to [it].”<sup>49</sup> That is what *Bostock* says it has done here.

This might have ended the matter. Had it, the opinion would have done little more than recapitulate its earlier textualist holding. In proceeding with its explanation, the opinion begins suggesting an extra-textual reason for what it has done.

Recognizing how this no-donut-hole rule has worked in the past, *Bostock* invokes two purportedly clarifying examples involving cis women (though the opinion does not call them this, quite).<sup>50</sup> The opinion notes that the Court has long held “[s]exual harassment” and “motherhood discrimination” are outlawed by Title VII even though—like anti-gay and anti-trans discrimination—they are “conceptually distinct from sex discrimination.”<sup>51</sup> Despite this, *Bostock* observes, nobody in the litigation—not even the employers defending against charges of unlawful sex discrimination—would wish to deny that sexual harassment and motherhood discrimination are properly within Title VII’s purview. The Court is confident enough of this position that, instead of pointing to anything in the briefing or the oral arguments to this effect, it delivers the point rhetorically: “Would the employers have us reverse those cases [involving sexual harassment and motherhood discrimination] on the theory that Congress could have spoken to those problems more specifically? Of course not.”<sup>52</sup>

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part, that “if these people are allowed to come out of the closet, I’ll be serving aboard a ship and wondering who’s who and what’s what”).

48. *Bostock*, 140 S. Ct. at 1739, 1747 (noting “sex” is the broad term that it is dealing with); *id.* at 1747 (“necessarily”); *id.* at 1739–40, 1746–47 (discussing “but-for” sex causation rules and their operation).

49. *Id.* at 1747.

50. *Id.*

51. *Id.* The opinion also brings up these examples very early on. *Id.* at 1737. And later on. *Id.* at 1752.

52. *Id.* at 1747. The same rhetorical gesture is repeated in part, as to sexual harassment, in *id.* at 1751–52. *Bostock*’s unqualified answer might actually be subject to some qualifications not engaged here, but noted in Spindelman, *Shower’s Return: Part III*, *supra*

Lest it be missed, that rhetorical delivery right there is not strictly an expression about statutory text and its meaning. Building from the unthinkability of reversing Supreme Court cases involving sexual harassment and motherhood discrimination, it is also vitally a play from precedent and stare decisis, which is itself, as Justice Antonin Scalia explained, “not a part of textualism.”<sup>53</sup> In indicating its unwillingness to contemplate overturning the Court’s sexual harassment and motherhood discrimination cases for the sake of a dubious theory, *Bostock*’s reply to its own question draws its legal force from the ongoing authority that the Court’s Title VII sexual harassment and motherhood discrimination cases possess. That authority packs sufficient legal punch that the mere invocation of those cases here helps to seal the fortunes of anti-gay and anti-trans discrimination as Title VII sex discrimination.<sup>54</sup> Thus, *Bostock* says as it concludes: “As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.”<sup>55</sup>

One challenge that this line of thinking presents is how it recognizes—even as it obscures—an important facet of the relationship between the Court’s sexual harassment and motherhood discrimination cases and Title VII’s text. Read in conjunction with an earlier passage in the opinion, *Bostock*’s recognition that sexual harassment and motherhood discrimination are “conceptually distinct from sex discrimination” under the statute means that they do not precisely track what *Bostock* accepts as Title VII’s definition of “sex”: the original public meaning of the term, according to which, “sex” refers to the biological differences between men and women in an entirely cisnormative sense.<sup>56</sup> Sexuality and its consequences, including reproduction thence motherhood, and hence both sexual harassment and motherhood

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note 9, at 108–110 (flagging the prospects of a “family values” understanding of Title VII’s sex discrimination ban).

53. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 413–14 (2012) (“Stare decisis—a doctrine whose function ‘is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability’—is not a part of textualism. It is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity.” (quoting ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–40 (1997))).

54. So does their invocation elsewhere in the opinion. See, e.g., *Bostock*, 140 S. Ct. at 1737, 1743–44, 1751–52.

55. *Id.* at 1747.

56. *Id.* (“conceptually distinct from sex discrimination”). For the earlier passage in the opinion in which *Bostock* announces its working definition of sex, see *id.* at 1738–39.

discrimination, are not about “sex” in this precise, narrow sense. Close, they involve something else again: something like sexual desire, attraction, or motivation, where sexual harassment is concerned, and motherhood, or perhaps sexual reproduction or parenting, where motherhood discrimination is.

This conceptualization of the Supreme Court’s sexual harassment and motherhood discrimination cases and their relation to Title VII recognizes that a certain gap exists—and persists—between Title VII’s text, with its biological and cisnormative understanding of “sex,” and the Court’s more expansive understanding of the term in its sex discrimination caselaw.<sup>57</sup> Even though sexual harassment and motherhood discrimination are “conceptually distinct from sex discrimination,” the Court has held that they “can [and do] fall within Title VII’s sweep.”<sup>58</sup> Seen this way, *Bostock* is actively building upon the caselaw side of the gap when it leverages the unlawfulness of those forms of discrimination under Title VII to treat anti-gay and anti-trans discrimination as sex discrimination likewise banned by the statute.

However illuminating of *Bostock*’s efforts and its thinking, *Bostock*’s rhetorical question and answer, and the larger interpretive conclusions toward which they point, involve a notable strategy of evasion. They enable the opinion to avoid dealing head on with deeper

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57. Here it appears that *Bostock* arcs toward figuring sexual harassment, motherhood discrimination, as well as anti-gay and anti-trans discrimination as forms of “sex-plus” discrimination under Title VII without ever using these precise terms or elaborating their implications. On “sex-plus” discrimination under Title VII, see MARTHA CHAMALLAS, PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW 68 (2019) (“Title VII’s ban on sex discrimination has extended to so-called ‘sex-plus’ claims that involve selective discrimination based on the plaintiff’s sex but also on some other characteristic.” (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 542 (1971))); see also *id.* at 165 (“*Martin Marietta* is best known for endorsing the ‘sex plus’ theory of discrimination, a doctrine that underscores that a plaintiff need not prove that sex is the sole basis for a decision or that the employer discriminates against all members of a protected group.”). For relevant discussions of *Phillips v. Martin Marietta* in the *Bostock* majority opinion, see *Bostock*, 140 S. Ct. at 1743–46. See also *id.* at 1752 (same). This perspective on *Bostock* illuminates the Tenth Circuit’s invocation of *Bostock* as authority for expanding the Title VII’s sex-plus doctrine in an opinion holding “that sex-plus-age claims are cognizable under Title VII.” *Frappied v. Affinity Gaming Black Hawk, L.L.C.*, 966 F.3d 1038, 1048 (10th Cir. 2020). Thoughtful discussion of sexual orientation discrimination as sex-plus discrimination under Title VII is in Marc Chase McAllister, *Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination*, 67 BUFF. L. REV. 1007 (2019), and Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J. FORUM 67 (2018). Thanks to Martha Chamallas for discussion of this dimension of the *Bostock* opinion.

58. *Bostock*, 140 S. Ct. at 1747.

objections raised by the parallels they figure among the various forms of sex discrimination they indicate *Bostock* involves.

An initial wonder focuses on whether *Bostock* is serious about the counterfactual impact that a ruling against the anti-gay and anti-trans discrimination claims in the case would have had on the Court's sexual harassment and motherhood discrimination cases. For some time now, those cases have been regarded as comprising deeply settled law. *Bostock* attests to this through its indication that the parties to the litigation understood that reversing those cases was beyond the legal pale.<sup>59</sup> The accuracy of this description of the vibrancy of the Court's sexual harassment and motherhood discrimination rules, however, frames the oddity of *Bostock*'s position. If those rules are as rock solid as the opinion evidently believes, why—suddenly—would refusing to extend their logics to encompass anti-gay and anti-trans discrimination under Title VII imperil them, much less require them to be overturned? If, given the solidity of the sexual harassment and motherhood discrimination cases, they are in no such danger, how perfect are their parallels to anti-gay and anti-trans discrimination? And if these parallels are less perfect than *Bostock* intimates, why exactly does the Court's opinion reject the prospects of distinguishing between and among them?

*Bostock* is silent on these matters—a silence that dovetails with another on a related set of counter-arguments associated with thinking found in Justice Alito's *Bostock* dissent, casting doubt on *Bostock*'s insistence that sexual harassment, motherhood discrimination, and anti-gay and anti-trans discrimination are like elements in a larger legal set. Justice Alito's dissent offers reasons for believing that sexual harassment,

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59. *Id.*; see also *id.* at 1751–52. This is not to overlook the critiques of the Supreme Court's sexual harassment rules that have been ventured. See, e.g., Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 198 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (“[Vicki Schultz’s] work allows us to imagine refocusing sex harassment regulation to emphasize women’s equal participation in the workforce obtained in the most sexually liberating, rather than the most sexually regulatory, terms possible. Perhaps it is time to break even more eggs than Schultz does.”); Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL’Y 307, 308 (1998) (arguing that the Supreme Court “should abandon *quid pro quo* [harassment] rather than shoulder the pointless task of clarifying it”). A reply to Halley’s argument is in Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1 (2004) [hereinafter Spindelman, *Sex Equality Panic*]. An important critique of “[t]he [r]epretonormativity of [m]otherhood” that could be worked up into a position critical of Title VII’s motherhood discrimination rules is in Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–97 (2001). An important reply is in Mary Becker, *Caring for Children and Caretakers*, 76 CHI-KENT L. REV. 1495, 1522–39 (2001).



including male-on-male sexual harassment, along with motherhood discrimination, are meaningfully—and distinguishably—different, because they bear different sorts of relationships to the core of Title VII's sex discrimination concerns about ensuring and promoting workplace equality for cisheterosexual women.<sup>60</sup>

One position, consistent with ideas in Justice Alito's dissent, though not itself a position the dissent fully ventilates, sees the differences between and among these various forms of sex discrimination as stark across the board, but starkest where traditional (meaning: cisheterosexual-male-on-cisheterosexual-female) sexual harassment and motherhood discrimination claims are concerned.<sup>61</sup> While there once were “hot[ly]” “contest[s]” over whether these types of discrimination were actionable under Title VII's sex discrimination ban, the Court's decisions recognizing them as “fall[ing] within Title VII's sweep” seem generally easier—to the point of being practically obvious—now.<sup>62</sup> In this respect, the *Bostock* majority opinion reflects what have become mainstream legal sensibilities that see cross-sex sexual harassment and motherhood discrimination rules not as just close to—but as comfortably within—Title VII's core sex discrimination concerns. If so, *Bostock*'s position that anti-gay and anti-trans discrimination are like them looks to skip over a needed explanation for how including these types of discrimination within Title VII's terms promotes cisheterosexual women's workplace equality. Explanations along these lines, of course, exist, and so *Bostock* might have embraced them.<sup>63</sup> That it does not even reach for them in this

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60. For the Alito dissent's relevant discussion of sexual harassment rules, see *Bostock*, 140 S. Ct. at 1773–74 (Alito, J., dissenting). For the relevant discussion of motherhood discrimination rules, see *id.* at 1775. As to motherhood discrimination, the dissent emphasizes that “motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes between motherhood and parenthood is necessarily a policy that draws a sex-based distinction.” *Id.* In making this point, the dissent is evidently thinking only about cis women, missing the realities of different forms of trans parenting.

61. The dissent comes closest to this articulation in relation to motherhood discrimination. See *id.* at 1775.

62. *Id.* at 1752 (majority opinion) (“While to the modern eye each of these examples may seem ‘plainly [to] constitut[e] discrimination because of biological sex,’ all were hotly contested for years following Title VII's enactment.” (citation omitted)); *id.* at 1747 (“fall[ing] within Title VII's sweep”). See also Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 817 (1991) (observing, in the context of sex-plus discrimination cases, that “[e]arly decisions struggled with issues which to most people now seem easy”). Part of the reason the majority does not engage them is related to its view of Title VII as an individual rights statute that protects both women and men as individuals, not as members of groups.

63. See, e.g., Ann C. McGinley et al., *Feminist Perspectives on Bostock v. Clayton*

passage scarcely aids understanding *Bostock*'s reasons for its conclusion that all these forms of discrimination are statutorily alike.<sup>64</sup>

The Supreme Court's ruling in *Oncale v. Sundowner Offshore Services, Inc.*, extending traditional, cross-sex sexual harassment protections to encompass male-on-male sexual harassment, makes sense of Justice Alito's dissent's decision not to press this point and claim advantage in just this way.<sup>65</sup> After *Oncale*, anti-gay and anti-trans discrimination need not be shown to implicate core Title VII sex discrimination concerns in order for them to be held within the ambit of the statute's protections. As the *Bostock* majority opinion repeatedly notes, *Oncale* emphasized that male-on-male sexual harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII."<sup>66</sup> *Oncale*, however, regarded this fact as "immaterial"

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County, 53 CONN. L. REV. ONLINE 1, 12 (2020) ("[T]he Court misses . . . the *real* argument for why Title VII's prohibition on sex discrimination protects persons who are LGBTQ+. . . . *Discrimination against persons on the basis of LGBTQ+ status is rooted in and implicitly 'justified' by their perceived and actual violation of the patriarchal norms that structure our society.*" (observations of Pamela Wilkins)).

64. See *id.* (observing that "the majority's . . . opinion never seriously acknowledges what is at stake," and then going on to note the patriarchal stakes of the case). The majority's decision not to reach for arguments linking anti-gay and anti-trans discrimination to women's workplace equality in this passage or elsewhere is part of the reason that Justice Alito's dissent can so easily observe that "sexual orientation is not historically tied to a project that aims to subjugate either men or women[;] [a]n employer who discriminates on this ground might be called 'homophobic' or 'transphobic,' but not sexist." *Bostock*, 140 S. Ct. at 1765 (Alito, J., dissenting). Not incidentally, in saying this, the dissent also appears to be saying that trans identity is also "not historically tied to a project that aims to subjugate either men or women." *Id.* For replies to this idea, see *infra* note 76 (collecting a few sources). Relevant discussion is also found *infra* Part II.B.1.

65. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79, 82 (1998).

66. *Id.* at 79. The *Bostock* majority opinion repeatedly points to this dimension of *Oncale*. *Bostock*, 140 S. Ct. at 1744, 1749, 1751. For the *Bostock* majority's larger engagements with *Oncale*, see *id.* at 1743–44, 1747, 1749, 1751–52. Examples of lower courts reading *Oncale* along these lines to ground both anti-gay and anti-trans sex discrimination claims under Title VII include: *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) ("[T]he drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws . . . by which we are governed.'" (quoting *Oncale*, 523 U.S. at 79)); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018) (en banc) ("*Oncale* instructs that the text is the lodestar of statutory interpretation . . . . We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it."); and *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc) (noting relevance, inter alia, of *Oncale* "to the issue before" the court);

when it offered its interpretation of the law.<sup>67</sup> Justice Scalia's opinion for the *Oncale* Court explained that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws . . . by which we are governed."<sup>68</sup> Protections for men against same-sex sexual harassment in *Oncale* thus reduced to, and became a function of, "the plain scope" of Title VII's statutory protections: Since men, too, can suffer "sex" discrimination under Title VII's definition, their rights to sexual harassment protections were at least "reasonably comparable" to women's in traditional cross-sex sexual harassment cases. Men could thus hardly be categorically blocked from receiving the benefits of the Supreme Court's sexual harassment rules once the Court's "precedent[s] . . . established that sexual harassment may constitute sex discrimination within the meaning of Title VII."<sup>69</sup> Refusing to recognize men as entitled to these legal benefits would have required the *Oncale* Court to do precisely what *Bostock* is saying the Court categorically must not do: "carve out an exception to the statutory text."<sup>70</sup>

Justice Alito's dissent parts ways with the *Bostock* majority in thinking that what makes *Bostock* different from *Oncale* is that anti-gay and anti-trans discrimination do not come within Title VII's definition of sex—at all. Refusing to recognize that they do, therefore, does not involve any improper "carve out" from—or any "donut hole" being created within—its statutory terms.<sup>71</sup>

Justice Alito's dissent presents its explanation for this position as a targeted report on why "*Oncale* does not provide the slightest support for what the Court has done today," but the reasons the opinion offers apply more broadly, and they effectively convey why the dissent regards it as an error to assimilate anti-gay and anti-trans discrimination to the wider sex discrimination set that includes the Court's sexual harassment and

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*id.* at 344 ("Our interpretive task is guided . . . by the Supreme Court's approach in the closely related case of *Oncale* . . .").

67. *Bostock*, 140 S. Ct. at 1743; *see also id.* at 1774 (Alito, J., dissenting).

68. *Id.* at 1774 (quoting *Oncale*, 523 U.S. at 79).

69. *Id.*; *id.* at 1747 (majority opinion); *see also id.* at 1741 ("This statute works to protect individuals of both sexes from discrimination, and does so equally."); *see also infra* note 138. As Justice Alito's dissent puts the point in other terms: "Given these premises, syllogistic reasoning dictated the holding" in *Oncale*. *Bostock*, 140 S. Ct. at 1774 (Alito, J., dissenting).

70. *Bostock*, 140 S. Ct. at 1774 (Alito, J., dissenting).

71. *Id.*; *id.* at 1747 (majority opinion).

motherhood discrimination cases.<sup>72</sup> This is the dissent: “Whether we like to admit it now or not, in the thinking of Congress and the public at that time [in 1964], such discrimination[, namely, “discrimination because of sexual orientation and transgender status”] would not have been evil at all.”<sup>73</sup> *Bostock*, on this view, involves no evil that is “comparable” to the evils implicated by the Court’s sexual harassment cases, including *Oncale*, or its motherhood discrimination cases. The conclusion that Justice Alito’s dissent reaches, based on all this, is that anti-gay and anti-trans discrimination should not be regarded as forms of sex discrimination outlawed by Title VII. The gap between Title VII’s text and the Court’s rules of statutory anti-discrimination coverage, such as they are—and the dissent does not deny them entirely—does not, in the dissent’s view, tolerably extend that far.

There is a certain painful truth in Justice Alito’s dissent’s observation about anti-gay and anti-trans discrimination historically comprising no legal “evil at all.”<sup>74</sup> Recognizing this truth without endorsing the historical anti-gay and anti-trans normativities that the dissent thereby legally operationalizes, *Bostock*’s stance that it must recognize anti-gay and anti-trans discrimination so as to avoid imperiling and even having to overturn the Court’s sexual harassment and motherhood discrimination cases falters. If the majority’s position is to be sustained, it calls for a more nuanced argument—one that seriously engages the view that differences of degree and kind exist between and among the types of sex discrimination cases that the opinion has in mind. Missing such an engagement, *Bostock*’s rhetorical position that the Court’s sexual harassment and motherhood discrimination doctrines stand or fall based on its treatment of anti-gay and anti-trans discrimination appears evasive—and overfed. *Bostock* may ultimately be right that the Court’s longstanding tolerance for the gap between Title VII’s definition of “sex,” on the one hand, and sexual harassment and motherhood discrimination rules, on the other, should imply a more categorical toleration of that gap as it widens beyond *Oncale* to

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72. *Id.* at 1774 (Alito, J., dissenting).

73. *Id.* As the dissent elsewhere notices, the evils of anti-gay discrimination were historically such that they were not only not regarded as evil, but a good that was affirmatively called for, including under law: “[T]he plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.” *Id.* at 1769.

74. *Id.* at 1774.

encompass anti-gay and anti-trans sex discrimination claims.<sup>75</sup> However imaginable that position may be, it is not, finally, spelled out in *Bostock*'s text.<sup>76</sup>

This leaves *Bostock*'s readers, even after this passage, searching for a stable account that persuasively explains why anti-gay and anti-trans discrimination—forms of discrimination that *Bostock* confirms are “conceptually distinct from sex” discrimination—are nevertheless properly treated by the opinion as coming within Title VII's sex discrimination rule, rather than being held to be beyond it.<sup>77</sup> The clue that *Bostock* supplies in this setting—and it is an important one—is that the reasons have something centrally to do with the steadying weight of precedent that *Bostock* means to build on and not “reverse.”<sup>78</sup>

## 2. Passage Two: “[A] [C]urious [D]iscontinuity”<sup>79</sup>

Later in the opinion, *Bostock* replays some of these basic dynamics in a different setting.<sup>80</sup> Here, *Bostock* is dealing with defense arguments militating against the Title VII causation standard that the opinion has embraced as a standard that applies in all cases claiming sex discrimination, including in cases of anti-gay and anti-trans discrimination, held to involve sex discrimination under the statute. As in the earlier passage on the no-donut-hole canon, *Bostock* proceeds from the firm foundation of its own textualist ruling as it critically engages—then dismisses—defense counterarguments.

75. At least it is categorical in the context of the forms of sex discrimination that *Bostock* involves, all of which are “inextricably” related to sex, rather than being “related [to it only] in ‘some vague sense.’” *Id.* at 1761 (Alito, J., dissenting) (citing *id.* at 1741–42 (majority opinion)).

76. See *supra* note 64. As to anti-trans discrimination as sex discrimination, see also Lori Watson, *The Woman Question*, 3 TSQ: TRANSGENDER STUDIES QUARTERLY 246 (2016); Brief for Anti-Discrimination Scholars as Amici Curiae Supporting the Employees at 8–22, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107). As to anti-gay discrimination as sex discrimination, see, for example, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Marc Spindelman, *Gay Men and Sex Equality*, 46 TULSA L. REV. 123 (2013) [hereinafter Spindelman, *Gay Men and Sex Equality*]. Additional sources are collected in *id.* at 131 n.27. For some movement in at least some of these directions in *Bostock*, not worked up into a full-dress account, see *Bostock*, 140 S. Ct. at 1741–43, 1748–49. The discussion *infra* Parts II.B.1, II.B.3 speaks more to these points.

77. *Bostock*, 140 S. Ct. at 1746–47 (majority opinion).

78. *Id.* at 1747.

79. *Id.* at 1749.

80. See generally *id.* at 1748–49.

Training its sights on employer positions that surfaced during the litigation, *Bostock* maintains that they reflect an understanding of Title VII's sex discrimination ban that would invoke the deployment of a "stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status."<sup>81</sup> Having put the point this way—particularly situated against the backdrop of its own legal conclusions in the case—*Bostock* characterizes this approach as one that would "create a curious discontinuity in our case law" that the text of Title VII does not warrant, and that the Court's opinion, accordingly, rejects.<sup>82</sup> At first blush, this looks like a text-based reason for rebuffing the employers' claims.

On closer inspection, however, this is an argument from a conclusion that has practically shifted the burden of textual justification away from the *Bostock* Court's opinion and its understanding of Title VII and onto the defense position that the Court wishes to dismiss.<sup>83</sup> Clever as a debater's trick, this is not an especially thoughtful means of addressing the parties, their related publics, and their shared litigation arguments with an account for why the Court has interpreted the text of Title VII the way that it has. The "curious discontinuity" of the differential causation standard pushed by the defense is only "curious" and a "discontinuity" with the caselaw if one agrees that *Bostock*'s pro-gay and pro-trans interpretation of Title VII's sex discrimination ban is correct.<sup>84</sup>

For the majority and its supporters, the observation carries, but the point that *Bostock* is dismissing here is grounded in the view that Title VII's text does not at all warrant the conclusion that lesbian women, gay men, and trans people are entitled to the conventional protections of Title VII's sex discrimination ban, including its conventional causation rules.<sup>85</sup>

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81. *Id.* at 1749.

82. *Id.* The move partakes of what Andrew Koppelman calls "the subtractive strategy": "The subtractive strategy is an innovation in statutory interpretation. It seeks to draw upon the cultural context at the time of enactment to avoid unwelcome implications of a statute's plain language—and to call what one has done 'textualism.'" Koppelman, *supra* note 2, at 3.

83. *Bostock*, 140 S. Ct. at 1739–40 (discussion of "because of" and the but-for causation standard); *id.* at 1739 ("In the language of law, this means that Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." (citation omitted)); *id.* at 1749 ("No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status.").

84. *Id.* at 1749 ("curious discontinuity").

85. One version of this argument is in Justice Alito's dissent. *See, e.g., id.* at 1775 (Alito,

Seen that way and stated plainly: If anti-gay and anti-trans discrimination were not properly within the ambit of Title VII's sex discrimination protections, then there would be nothing legally problematic about the idea that a different set of causation rules might apply "only in cases involving discrimination based on sexual orientation or transgender status."<sup>86</sup>

Keeping with this perspective, the Court's position is readily reversed. From the point of view that the Court's opinion dismisses, the question persists: What in the text of Title VII warrants *Bostock* affording anti-gay and anti-trans discrimination the full and equal measure of Title VII's sex discrimination protections? *Bostock*'s position, inverting that question, offers no satisfactory account that explains why it has read the statute the way it has read it in this case. The debater's trick on this level looks to be just that: a trick, a dodge.

Nor is it only from within a textualist perspective like those in the *Bostock* dissents that *Bostock*'s apparent answer-by-deflection is insufficient. It is, though, still an important step that reads as a tacit acknowledgement by the Court that a demand for justification is rightly being placed upon it. Why does *Bostock* eliminate the "curious discontinuity" that has been allowed to exist in the caselaw until now?<sup>87</sup> *Bostock* is correct that the text of Title VII does not speak to the imposition of a more onerous standard for lesbian, gay, and trans people involving their discrimination claims, but it is also the case that Title VII does not expressly speak to whether they should get the same benefit of the "simple" and "traditional" "but-for" test the Court says that they deserve.<sup>88</sup> Whether they do (or do not) is part of the basic issue *Bostock* involves, which the Court resolves, but without pointing to an answer in the very text whose meaning is at issue.

As before, *Bostock* indicates that a result contrary to the one it actually reaches would produce a distortion in the caselaw. This suggests that *Bostock* is concerned about preserving precedent for the sake of those cisheterosexuals whose rights are being implicated by it, but, just as in

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J., dissenting) ("[T]he essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court's extensive discussion of causation standards is so much smoke.").

86. *Id.* at 1749 (majority opinion). For problems with this view, see *infra* Part III.A.

87. *Id.*

88. *Id.* at 1739.

the no-donut-hole-canon passage, precedent itself does not make the choice for the *Bostock* Court. *Bostock*'s reading of Title VII's sex discrimination ban here is not a function of the text, but its own choosing. Once again, *Bostock* leaves the reason for that choice undeclared.

But not for long. Much to its credit, in a subsequent passage, *Bostock* finally relents and explains the grounds for its interpretive choice in terms that do not sound with textualism, but against it.

### 3. Passage Three: “[D]isfavored [G]roup[s]” — and “Justice”<sup>89</sup>

Here, then, is what may very well be the single most important passage in the Court's *Bostock* opinion.<sup>90</sup>

Like the earlier passages where *Bostock* looks beyond Title VII's text for the basis of its interpretation of it, this one arrives in *Bostock*'s larger discussion of statutory interpretation arguments negatively portrayed as purposivist accounts of Title VII's meaning and related policy claims from defendants about how to read the statute.<sup>91</sup> By this point, *Bostock* has already established its textualist positions and observed that extra-textualist touchstones for interpretive judgment, including legislative purpose, are, in the main, unnecessary, even illegitimate, for the Court to consider within the four corners of its textualist ruling.<sup>92</sup> According to *Bostock*, since the meaning of Title VII's

89. *Id.* at 1751 (in the original it is “disfavored group”; “justice” is as it is).

90. *See generally id.*

91. *Id.* at 1749 (“Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy.”); *see also id.* at 1745 (“[T]he employers are left to retreat beyond the statute’s text, where they fault us for ignoring the legislature’s purposes in enacting Title VII . . . . But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.”).

92. For some earlier discussion of the point in the majority opinion, *see id.* at 1739–41. For additional discussion, *see also*, for example, *id.* at 1737 (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law . . . .”); *id.* at 1738 (“[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.”); *id.* at 1745 (“In the end, the employers are left to retreat beyond the statute’s text, where they fault us for ignoring the legislature’s purposes in enacting Title VII or certain expectations about its operation. . . . But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.”); *id.* at 1747 (“[S]peculation about why a later Congress declined to adopt new legislation offers a ‘particularly dangerous’ basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.” (citation omitted)); *id.* at 1749 (“[W]hen the meaning of the statute’s terms is plain, our job is at an end. The people are entitled to rely on



sex discrimination ban is “plain,” extra-textual considerations for figuring statutory meaning are improper and inevitably involve judicial policy making.<sup>93</sup> *Bostock* notes the exception of a special set of cases in which historical sources may be consulted to determine a statute’s meaning, but explains that that exception does not apply in this case.<sup>94</sup>

After a passage in which *Bostock* actively poses a series of rhetorical questions that challenge its own normative underpinnings, the opinion zeroes in on a concern that it recognizes its ruling “reasonably” raises, about whether the approach it has taken in the case will or “will not be deployed neutrally.”<sup>95</sup> *Bostock* perceives that behind this concern is a “lurking . . . cynicism that Congress could not *possibly* have meant to protect a disfavored group.”<sup>96</sup>

Bracketing the opinion’s remark on “lurking . . . cynicism,” which subtly casts *Bostock*’s opponents as political brutes who side with, and would have the Court side with, the mighty over the meek, *Bostock*’s suggestion that the statutory interpretation project it is undertaking involves protecting “a disfavored group” is puzzling.<sup>97</sup> Why is *Bostock* leaning on this notion in its account of Title VII’s meaning? Did the Court not itself adamantly insist amidst an extended discussion early on that

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the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”); *id.* at 1750 (“[T]he employers take pains to couch their argument in terms of seeking to honor the statute’s ‘expected applications’ rather than vindicate its ‘legislative intent.’ But the concepts are closely related. . . . However framed, the employer’s logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.”); *id.* at 1753 (“[E]mployers are left [with] . . . the last line of defense for all failing statutory interpretation arguments: naked policy appeals. . . . [T]hat’s an invitation no court should ever take up.”); *id.* (“As judges we possess no special expertise or authority to declare . . . what a self-governing people should consider just or wise.”); *id.* at 1754 (“Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.”).

93. *See, e.g., id.* at 1743 (noting “plain” meaning); *id.* at 1748 (same); *id.* at 1749–50 (same).

94. *Id.* at 1749 (granting that, “[o]f course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language,” but restating that “no ambiguity exists about how Title VII’s terms apply to the facts before us”); *id.* at 1750 (allowing that the context of an enactment can sometimes change the ordinary meaning of a statute, but noting that the employers in *Bostock* “advocate nothing like that”).

95. *Id.* at 1751.

96. *Id.* (“One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group.”).

97. *Id.*

Title VII's sex discrimination ban is about protecting "women" and "men" *as individuals only*, and not as members of groups?<sup>98</sup> If so, this concern about "disfavored group[s]" is beset by extra-textualist resonances.<sup>99</sup> There may yet be a way to reconcile the points, but this reads as an indication that something not very textualist is going down here.

*Bostock* proceeds to invoke "this Court's encounter with [a directive of] the Americans with Disabilities Act" for what it can teach, valuable to the matter at hand.<sup>100</sup> *Bostock* processes the example by sketching a larger lesson that transcends the Americans with Disabilities Act. The point of the digression emerges as a high-minded and far-reaching observation about what the law requires. Immediately before delivering its punchline, *Bostock* indicates that what it is about to say applies generally "to groups that were politically unpopular at the time of the law's passage."<sup>101</sup> Here, again, is group-focused thinking at work, though this time around, the opinion is specific about the groups it has in mind. What it is about to say involves the forerunners to the *Bostock* plaintiffs: "homosexual and transgender employees in the 1960s."<sup>102</sup>

Having mentioned these once-politically unpopular groups (or these once-and-still politically unpopular groups), and having thus made gay and trans people salient in its readers' minds, *Bostock* observes that:

[T]o refuse enforcement [of a statute] just because . . . the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.<sup>103</sup>

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98. *Id.* at 1740–41 (discussing the point in some detail). For some additional discussion of groups in *Bostock*, see *id.* at 1740, 1744, 1748.

99. *Id.* at 1751.

100. *Id.*; see also *id.* ("Congress, of course, didn't list every public entity the statute would apply to. And no one batted an eye at its application to, say, post offices. But when the statute was applied to *prisons*, curiously, some demanded a closer look . . ."); cf. 42 U.S.C. §12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

101. *Bostock*, 140 S. Ct. at 1751.

102. *Id.*

103. *Id.* It is worth noting a reading of this language from the opinion not pursued in the

This appeal, with its concluding language, is reminiscent of an observation that Justice Anthony Kennedy once might have sewn into one of his opinions involving LGBT rights.<sup>104</sup> Against the backdrop of *Bostock*'s own invocation of "homosexual and transgender employees in the 1960s," it delivers *Bostock*'s most extra-textualist reason yet for not "refus[ing] enforcement" of the statute.<sup>105</sup>

Past the double-negatives, *Bostock* is at long last serving up a substantive, non-textualist, values-based reason for its categorical, pro-gay and pro-trans reading of Title VII's sex discrimination ban. This reading means to attend to—and not "neglect"—the individuals who belong to these "disfavored group[s]" as a general matter of the fair "tilt [of] the scales of justice."<sup>106</sup> By these means, *Bostock* is going to make good—indeed, has already made good—on "the promise that all persons are entitled to the benefit of the law's terms."<sup>107</sup> However confusing this talk of "the scales of justice" may be, it should neither cause worry nor be mystifying. This is *Bostock* coming out as Lady Justice finding balance—and doing impartial justice—with her scales.<sup>108</sup>

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text. The opinion's indication that it does not wish to "abandon our role as interpreters of statutes" may be thought of as a way for the opinion to stick to its basic textualist claim. *Id.* From there, it looks like the second part of the sentence, involving improperly tilting "the scales of justice," might operate as a way of saying that justice does not counsel any other result. *Id.* Even if the passage were to be read along these lines, there would still be a question about the strength of the majority's textualist claim that Title VII's "clear" or "plain" meaning is at stake. *Id.* at 1737 ("clear"); *id.* at 1743 ("plain"). In any event, the additional recognition of a justice-based check on *Bostock*'s textualist conclusion reads as an indication that this is a legitimate ground on which to base thinking about how to read the statute in the case, and, what is more, that the majority has considered it in its conclusion. Notwithstanding the opinion's ongoing sense of its need to police its own "role as interpreters of statutes," which makes sense given the leading significance of the opinion's textualism, the opinion's outreach to a principle of justice may not register as an extra-textualist move, but it still is, particularly in a passage that is not strictly and only about Title VII's text, which is never claimed as the basis for the vision of justice the opinion embraces, although the opinion has it in mind as it writes. *Id.* at 1751. Another possibility that, at least partially, "saves" *Bostock*'s textualism as it functions in this passage is discussed *infra* note 139.

104. For one comparison, see *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.").

105. *Bostock*, 140 S. Ct. at 1751.

106. *Id.*

107. *Id.*

108. This is not the first opinion implicating LGBT rights in which the Supreme Court has represented itself as donning Lady Justice's mantle. For discussion of earlier examples, see Marc Spindelman, *Masterpiece Cakeshop's Homiletics*, 68 CLEVELAND ST. L. REV. 347, 410

B. *From the Abstract to the Concrete: Justice's Positive Law Legal Genealogy*

This image is lovely, but the thought behind it is disorienting. Having disavowed extra-textualist thinking about statutory interpretation, *Bostock* is invoking and explaining itself in relation to an ideal of justice like this?<sup>109</sup>

*Bostock*'s justice-based explanation of its choice to read Title VII's sex discrimination provision to cover anti-gay and anti-trans discrimination is not formally derived from Title VII's text. Accordingly, it does not involve an "interpretation" of that particular statute in that particular sense. In making this point, the opinion leads with a discussion of the Americans with Disabilities Act.<sup>110</sup> Title VII and its original enactment date merely lurk in the foreground of the background of the opinion's observations. Title VII is first subtext in this discussion before subtext bursts through the text—as text.

Had it wished to, *Bostock* could easily have identified an ideal of justice within Title VII and its sex discrimination rule. The law's wider remedial purposes—operating retrospectively and prospectively to overcome histories of discrimination—"do justice" on multiple fronts, including along the lines of sex. If *Bostock* does not invoke these remedial purposes, it is no doubt because that would involve embracing purposivism, an illicit move within the textualist terms that *Bostock* has set.<sup>111</sup> From an orthodox textualist point of view, *Bostock*'s alternative—

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(2020) [hereinafter Spindelman, Masterpiece Cakeshop's *Homiletics*] (noting that *Obergefell*, *Windsor*, and *Lawrence* all adopted "the rhetorical posture of the fearsome figure of Lady Justice with her blindfold on, balancing her scales without being able to see who the parties are"), and Marc Spindelman *Obergefell's Dreams*, 77 OHIO ST. L.J. 1039, 1094–1108 (2016) (sketching these rhetorical postures as they operated in *Obergefell*, and highlighting some of the phantasmatic horrors that Lady Justice can inspire).

109. Ultimately, it does not appear to be. The first look here is, in a sense, somewhat deceiving. For a counterpoint focused on *Bostock*, see *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at \*26 n.266 (S.D. Miss. Aug. 4, 2020) ("Justice Gorsuch's majority opinion in *Bostock* emphasized that 'no court should ever' dispense with a statutory text 'to do as we think best,' adding, 'the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.'" (citing *Bostock*, 140 S. Ct. at 1753)).

110. *Bostock*, 140 S. Ct. at 1751.

111. For an invocation of the purposivist point in *Bostock*, see *id.* at 1745 ("In the end, the employers . . . fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation. . . . But none of these contentions . . . allow us to ignore the law as it is.").

reaching beyond Title VII's four corners for this vision of justice—is no better, and is arguably worse. *Bostock's* vision of justice—the one on which its reading of Title VII's sex discrimination provision depends—being wholly extra-textual, defeats the opinion's textualism.<sup>112</sup>

But it is not, without more, the total defeat of *Bostock's* text. Indeed, in a vital way that *Bostock* itself does not detail, this extra-textualist principle of justice saves *Bostock's* own larger legal purposes by providing it legal grounding that its invocation tacitly suggests the Court knows its ruling otherwise lacks.

#### 1. “Justice” as Anti-Subordinationist?

Where, though, does *Bostock's* extra-textual vision of justice come from? What is its source?

One initial prospect is that *Bostock's* vision of justice is a general principle of political morality or a first-order moral or ethical precept. Of the various ways to specify these ideas, one that recommends itself relates to how *Bostock* indexes justice to the relative status of groups in hierarchical arrangements. When *Bostock* talks about delivering justice to “politically unpopular” groups, including “homosexual and transgender employees,” it brings to mind a politically problematic historicized sociology of group-based political power relations that it does not indulge, but works to transcend.<sup>113</sup> *Bostock* does this by legally flattening the historical, group-based hierarchical power arrangements in the present tense, redistributing group-based political power as its way of “doing” justice.<sup>114</sup>

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112. SCALIA & GARNER, *supra* note 53, at 347–48 (discussing “[t]he false notion that the quest in statutory interpretation is to do justice”).

113. *Bostock*, 140 S. Ct. at 1751.

114. *Id.* In this respect, the opinion echoes language from *Romer v. Evans*. See 517 U.S. 620, 634 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))). In saying what it does on this score, *Bostock* temporarily occludes the fact that even politically dominant groups, like cisheterosexuals, are not always homogenous. Concretely, this group has historically been rank-ordered hierarchically, among other things, by sex. For an anti-subordinationist vision of Title VII’s sex discrimination rule that builds on this understanding and has had a major influence on the Supreme Court’s doctrine of it, without yet reducing it to an anti-subordination project, see generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979), which was referred to in the course of the Supreme Court litigation that resulted in *Bostock*. Harris Funeral Homes Transcript, *supra* note 7, at 58 (“JUSTICE GINSBURG: No one ever thought sexual harassment was encompassed by discrimination on

*Bostock*'s justice-based political power rearrangements—achieved through its freeform balance of justice's scales, Lady-Justice-as-Robin-Hood-like—involve group-based political uplift that has something of an anti-subordinationist flair.<sup>115</sup> This substantive advance is most dramatic for trans people, who, for the first time in U.S. history, expressly receive legal protections from the Supreme Court within Title VII, the crown jewel of federal anti-discrimination law, not just a statute but a “super-statute.”<sup>116</sup> Lesbians and gay men receive their own affirmative boost in the form of legal protection and enhanced group-based power in the workplace setting. What is more, neither of these advances are or could be limited to work and only work life.

Still, *Bostock*'s group-based redistributivist maneuvering is no

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the basis of sex back in '64. It wasn't until a book was written in the middle '70s bringing that out.”). For further treatment of anti-subordinationist visions of Title VII, see, for example, Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2378–2408 (1994). For more on the basic point, see, inter alia, CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 127–54 (1989).

115. Here this would effectively be a kind of reversal of the ways that “the strong dominate and exploit the weak.” Robin West, *Reconstructing the Rule of Law*, 90 GEO. L.J. 215, 217 (2001) [hereinafter West, *Reconstructing the Rule of Law*]. For reasons to be discussed in the text, it may be significant to note that West makes this point in the context of a rule-of-law discussion, as when highlighting the notion that “[l]aw is a more or less good thing, when and because it tempers the aggressions of the strong; it betters the condition of the weak; it makes life less brutal, less nasty, and a little longer, for all.” *Id.* at 218. For more comprehensive engagement, see WEST, *supra* note 3 at 17–61 (discussing various conceptions of the rule-of-law, including a Hobbesian vision). See also generally GOWDER, *supra* note 36 (offering a related equality-based account, grounded in the rule-of-law value of generality); Gowder, *supra* note 36, at 1021 (contending that “the rule-of-law . . . positively demand[s] at least a basic level of egalitarian justice, in the form of the command to eliminate social hierarchies embedded in the law” in counterpoint to a formal equality vision). Prominent tendencies in rule-of-law thinking and ideology may impose limits on the rule of law's substantive equality and redistributivist prospects. See, e.g., Robin West, *Paul Gowder's Rule of Law*, 62 ST. LOUIS U. L.J. 303, 308 (2018) (describing concerns that “rule of law thinking and rule of law ideology has driven too many—e.g., F.A. Hayek and Robert Nozick—to the conclusion that it cannot [redistribute income from the rich toward the poor]: that the very idea of ‘law’ puts burdens on progressive, redistributive understandings, of say, tort law, contract law, or for that matter tax law, because ‘generality’ forbids this kind of eyes-open wide-awake differential treatment of rich and poor”).

116. See, e.g., William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231–46 (2001) (treating “super-statutes,” including Title VII). The notion of the “super-statute” surfaces in *Bostock*, both directly, 140 S. Ct. at 1754 (describing the Religious Freedom Restoration Act of 1993 “as a kind of super statute”), and indirectly, as where the 1964 Civil Rights Act is flagged as a stand-out measure within the U.S. legal system. *Id.* at 1737 (“In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964.”).

programmatic announcement that the Supreme Court will henceforth read Title VII's sex discrimination rule to require substantive equal justice generally for historically politically subordinated groups like "homosexual and transgender employees."<sup>117</sup> Although other indications of anti-subordinationist thinking can be found in *Bostock*'s text—indications that might, in the future, serve as a basis for treating *Bostock* as an anti-subordinationist ruling—the opinion's emphatic and repeated declarations that Title VII is an individual rights statute, and not a statute involving group rights, cuts short whatever anti-subordinationist prospects it may otherwise presently have. This is because anti-subordinationism is classically bound up with the relative positions and conditions of social groups.<sup>118</sup> Nor, in this setting, should anyone forget some of the anti-anti-subordinationist positions that *Bostock*'s author and one of its signatories (that would be Chief Justice John Roberts) have elsewhere embraced, which reinforce the impression that *Bostock*'s vision of justice does not convert the Court's opinion into an anti-subordinationist text.<sup>119</sup>

## 2. "Justice" as a Rule-of-Law Conception of Legal Justice

A different and more compelling account of *Bostock*'s ideal of "justice" emerges by resurfacing details of the larger textual passage in which this ideal appears. Context framing like this is, of course, inevitably choice-bound, a means of making—not simply discovering—a text. What recommends the choice in this setting is that the vision of "justice" it yields accords with *Bostock*'s broad textual sensibilities, including the positions that it takes on the meaning of Title VII's sex

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117. *Bostock*, 140 S. Ct. at 1751. The extension of such a point beyond the sex discrimination context seems equally difficult to imagine as a matter of authorial intent.

118. For the standard of the thought, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

119. For some relevant indications of Justice Gorsuch's position, see, for example, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2175–76 (Gorsuch, J., dissenting) (dissenting from a ruling striking down Louisiana abortion law); *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1155 (10th Cir. 2008) (Gorsuch, J., authoring majority opinion) (treating protections of the Individuals with Disabilities Education Act as "limited in scope," and not requiring "that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge"). Relevant indications of Chief Justice Roberts's position are in, inter alia, his opinions in *Obergefell v. Hodges*, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting), and *Shelby County, Alabama v. Holder*, 570 U.S. 529, 557 (2013) (Roberts, C.J., authoring majority opinion) (holding that Congress's "failure to act leaves us today with no choice but to declare §4(b) [of the Voting Rights Act of 1965] unconstitutional").

discrimination ban.

*Bostock* surfaces its ideal of “justice” in a paragraph responding to “reasonabl[e] fear[s]” about the “neutral[ity]” of its ruling, an “unexpected application[.]” of Title VII’s demands.<sup>120</sup> Will *Bostock* prove to be a neutral decision, as some—given this surprising turn of events—may understandably fear? “Neutrality” in this setting is less precisely a textualist value than one that corresponds to textualism’s roots in rule-of-law thinking.<sup>121</sup>

This passage, with its witness of *Bostock*’s rule-of-law commitments, meets Justice Kavanaugh’s *Bostock* dissent on terrain that the dissent expressly claims for itself. The Kavanaugh dissent describes its own textualism in terms of deeper rule-of-law and democratic accountability values.<sup>122</sup> According to the dissent, these foundations are

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120. The opening sentence of the paragraph is: “One could also reasonably fear that objections about unexpected applications will not be deployed neutrally.” *Bostock*, 140 S. Ct. at 1751.

121. *Id.* (the term is “neutrally” in the original). Prominently, Justice Antonin Scalia’s canonical accounts of textualism present this interpretive method as a species of rule-of-law argument. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997) (“Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!* The rule-of-law is *about* form. . . . Long live formalism. It is what makes a government of laws and not of men.”). Not surprisingly, rule-of-law values regularly animate and weave throughout textualist practices as a result. For additional thoughts on Scalian textualism and the rule of law, see Gautam Bhatia, *The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia’s Jurisprudence*, 42 HASTINGS CONST. L.Q. 525, 526 (2015) (“Justice Scalia’s approach to statutory interpretation rests upon his belief in a thin concept of the rule of law—that is, generally worded rules ought to be applied prospectively and impartially across the board.”); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 555 (2013) (reviewing SCALIA & GARNER, *supra* note 53) (“Scalia and Garner’s particular list of canons is dominated by a nonconstitutional value, that of *continuity*. Continuity is a rule of law value . . . . Similarly, the rule of law abhors uncertainty and fluctuating rules.”); Abigail R. Moncrieff, *Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory*, 72 RUTGERS U. L. REV. 39, 141 (2019) (describing Justice Scalia as one of “the most explicit thinkers about the rule-of-law motivations of textualism”); Donald B. Verrilli, Jr., *The Rule-of-law: More Than Just a Law of Rules*, 97 NEB. L. REV. 925, 926 (2019) (“Due in large part to the influence of Justice Scalia, the rule of law has become synonymous with a formalist kind of textualism in statutory construction and with originalism in constitutional interpretation. The idea is that these interpretive methods ensure fidelity to the rule of law . . . .”).

122. Democratic accountability, or, more simply, democracy, is sometimes counted as a rule-of-law value, too. *See, e.g.*, WEST, *supra* note 3, at 16–18 (noting that the rule-of-law “sometimes refers to America’s shared commitment to democracy” and sketching the argument); *id.* at 43–58 (discussing the rule-of-law “as expressive of the value of representative democracy” with particular reference to the views of Thomas Paine).



the “two main reasons” why “[j]udges adhere to [the] ordinary meaning” of statutory texts.<sup>123</sup> “A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America’s elected representatives for the laws they enact.”<sup>124</sup> The *Bostock* majority’s own more qualified notation of neutrality gesturally indicates that it is likewise responsive to rule-of-law values and concerns, though they run in the opposite directions of those in the Kavanaugh dissent.<sup>125</sup>

It is significant that *Bostock*’s vision of “justice” arises in a passage that is linked to the rule of law in these ways.<sup>126</sup> The placement suggests the prospect that *Bostock*’s talk of justice is a way of invoking the rule-of-law ideal of “legal justice.”<sup>127</sup> Classically, the ideal of legal justice—a distinctive way of discussing formal equality in the rule-of-law setting—broadly and procedurally requires, to use *Bostock*’s language, that “all [similarly situated] persons” are to be treated alike in the eyes of the law,

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123. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting). For further discussion of the rule-of-law underpinnings of the case, see *id.* at 1828.

124. *Id.* at 1825. Some important extensions of rule-of-law principles, including of justice, to the international setting, focusing on the climate change context, are discussed in Cinnamon Carlarne, *Climate Change, Human Rights, & The Rule of Law*, 25 UCLA J. INT’L L. & FOREIGN AFFS. 11 (2020).

125. Rule-of-law values, it turns out, can be as indeterminate as the textualisms that emerge from them.

126. See *infra* note 138 (discussing *Bostock*’s representation of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), as an opinion that reflects and reinforces a particular rule-of-law ideal of legal justice).

127. For treatment of “legal justice,” not as a singular, but rather as a contested concept, see generally WEST, *supra* note 3, at 1–4. For an important underlying source, see generally JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1986). Another to account for in this connection is David Luban, *Justice and Law*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 932 (James D. Wright ed., 2 ed. 2015). For additional refinements, see, *inter alia*, Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 773–75 (2001) (rounding out some different types of “legal justice”). As used here, the concept of legal justice hews closely to what Robin West calls “the ‘dominant interpretation,’ or the ‘reigning interpretation,’ of ‘legal justice,’” WEST, *supra* note 3, at 3, discussed in some detail in *id.* at 4–11, and described there as keyed to the idea of “formal equality” and “the imperative that presses upon judges to ‘treat likes alike,’ or to follow precedent, or to comply with *stare decisis*.” *Id.* at 7. For a different way of identifying “legal justice” as used here, see Waldron, *supra*, at 774–76 (discussing “formal legal justice” and “substantive legal justice”). Given the various operations of the term legal justice, there is a certain continuity between and among the three textual passages from *Bostock* discussed in these pages. The first two may be read to solidify the rule-of-law context for the third being treated here.

“entitled to” all the same “benefit[s] of the law’s terms” as everybody else.<sup>128</sup>

Figuring *Bostock*’s ideal of justice as a principle of legal justice, it bears noting that, as this principle circulates in *Bostock*, it does not simply involve an abstract concept of formal equality, a rule requiring likes to be treated alike. It involves that abstract concept along with a distinctive conception—or specification—of it, according to which lesbian women, gay men, and trans people are recognized as formally just like their cisheterosexual counterparts, and hence entitled to the same legal treatment.

Elsewhere in the opinion, *Bostock* confirms that it has aligned itself with ideas about formal equality. Formal equality thinking—and, in particular, formal equality thinking that attends to the demands for the equal treatment of LGBT and non-LGBT persons—is woven throughout *Bostock*’s text.<sup>129</sup> If *Bostock* repeatedly brings up group membership as it indicates that lesbian women, gay men, and trans people are to receive Title VII’s sex discrimination protections, it does so in order to declare that memberships in these groups is legally irrelevant, much in the way that the opinion announces that “homosexuality . . . [and] transgender status . . . [are] not relevant to employment decisions.”<sup>130</sup> Read back in terms of the rule-of-law value of “neutrality” that *Bostock* mentions, legal justice is also a way for the Court to achieve and practice a “neutral” legal stance.<sup>131</sup> *Bostock*’s vision of legal justice positions the Court to remain “neutral” as between and among persons who venture Title VII sex discrimination claims. No one receives any different legal treatment based on the happenstance of their membership in groups defined by

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128. See *Bostock*, 140 S. Ct. at 1751; see also, e.g., *id.* at 1740 (“To ‘discriminate against’ a person, then, would seem to mean treating that individual worse than others who are similarly situated.”). See *supra* note 127. An important set of related thoughts on the rule of law and equality under law is found in NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 9, 24, 41, 76, 125, 198, 237–41, 283–84, 323 (2019).

129. See, e.g., *id.* at 1737 (“Only the written word is the law, and all persons are entitled to its benefit.”); *id.* at 1749 (noting that Title VII’s sex discrimination rule’s application “in these cases reaches ‘beyond the principal evil’ legislators may have intended or expected to address,” but does so because the law’s terms are general and similar evils are to be treated similarly under law (quoting *Oncle v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1997))); *id.* at 1750 (making a similar point).

130. *Id.* at 1741

131. *Id.* at 1751 (the language in the opinion is “neutrally”).

sexual orientation or “transgender status.”<sup>132</sup> “[A]ll persons are entitled to the benefits of the law’s terms.”<sup>133</sup>

Interrupting the seamlessness of *Bostock*’s embrace of a rule-of-law vision of legal justice and how it underwrites the opinion’s textualist positions is the issue, problematic from a textualist point of view, that legal justice, as a rule-of-law ideal, does not derive from Title VII’s text.<sup>134</sup>

To say this is partly to note the details of *Bostock*’s discussion, which raises its undefined idea of justice in a passage that is not about Title VII in its leading terms.<sup>135</sup> More basically, it means to register a conceptual point. At least when it is understood to involve an abstract principle of formal equality calling for likes, generally, to be treated alike, legal justice is widely seen as a necessary condition of rule-of-law decision-making and practice.<sup>136</sup> On this level, all textualist decisions—indeed, all statutory interpretation decisions regardless of their interpretive method—must satisfy legal justice’s strictures if they are to satisfy the rule of law’s demands.<sup>137</sup> Even as *Bostock*, in its way, attests to the felt

132. *Id.* at 1741. In this respect, *Bostock* internalizes and follows the promise of neutrality prominently featured in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

133. *Id.* at 1751.

134. *See id.* at 1753 (suggesting that justice is not a textualist value when it observes that, “[a]s judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise”). *Cf. also* SCALIA & GARNER, *supra* note 53, at 347–48 (discussing “[t]he false notion that the quest in statutory interpretation is to do justice”).

135. *Bostock*, 140 S. Ct. at 1751.

136. WEST, *supra* note 3, at 1–3 (discussing dominant understanding of legal justice).

137. For some expression of this view in authoritative textualist sources, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989):

To achieve what is, from the standpoint of the substantive policies involved, the “perfect” answer is nice—but it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment. . . . The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. When one is dealing . . . with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one’s sense of justice to say: “Well, that earlier case had nine factors, this one has nine

pressures to follow the dictates of legal justice when interpreting Title VII, it does not do so strictly as a function of anything found within the four corners of Title VII's text. As a rule-of-law value, legal justice is—and remains—extrinsic to the statute. In somewhat technical terms, legal justice is, legally, lexically prior to Title VII, which makes *Bostock's* invocation of it the invocation of an extra-textual consideration. This, in turn, makes *Bostock's* reading of Title VII, based upon this extra-textual consideration, itself extra-textualist.

Nor does it change matters that, immediately after this break in its otherwise largely smooth textualist self-narrative, *Bostock* jumps back into the textualist saddle to resume its talk about “Title VII’s plain text.”<sup>138</sup> Insofar as *Bostock's* reading of Title VII’s sex discrimination rule depends on a rule-of-law conception of legal justice that is itself not found

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plus one.” Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.

See also *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79–80 (1997) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. . . . Our holding that [Title VII’s ban on sex discrimination] includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.”). *Bostock* pulls on this thinking from *Oncale*. See *Bostock*, 140 S. Ct. at 1743–44 (discussing and quoting this aspect of *Oncale*); *id.* at 1751–52 (same); see also *infra* note 138. Commentary tracking the underlying textualist points is in Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 625 (2005) (“New Textualism maintains that equality, uniformity and predictability are essential elements for promoting the Rule of Law. These three concepts are closely linked and share a similar aim: to cause every judge to reach similar results in similar cases based on similar rationales.”).

138. See, e.g., *Bostock*, 140 S. Ct. at 1751 (“The employer’s position also proves too much. If we applied Title VII’s plain text only to applications some (yet-to-be-determined) group expected in 1964, we’d have more than a little law to overturn.”). Importantly, in the course of jumping back into the textualist saddle, *Bostock* ties its textualist method to a rule-of-law conception of legal justice in a different way. Discussing *Oncale*, *Bostock* indicates—without using these terms—that *Oncale* was in its own way based on a conception of legal justice. According to *Bostock*, *Oncale* affirmed Title VII’s “plain terms” ban “male-on-male sexual harassment” on exactly the same terms as its cross-sex harassment counterpart. *Id.* at 1751–52. The subtler point is an indication that *Oncale* conformed to the Supreme Court’s constitutional sex discrimination rules and their broad-based requirements of sex neutrality, which emerge from an individualist view of sex discrimination’s harms. Cf. *id.* at 1774 (Alito, J., dissenting) (“[A]nybody reading [Title VII’s sex discrimination ban’s] . . . terms would immediately appreciate that it applies equally to both sexes, and by the time *Oncale* reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. Given these premises, syllogistic reasoning dictated the holding.” (citation omitted)). In this sense, legal sex discrimination norms play an important role in determining *Bostock's* outcome on this level, too.

within Title VII's text, *Bostock* cannot be the pure textualist ruling that it maintains.<sup>139</sup>

One way to register the implications of this point is that it strips *Bostock* of its textualist bona fides altogether. Another—this one more faithful to *Bostock*'s own larger purposes and to what it says—recognizes how complicated those textualist credentials are. Partaking of contradiction and paradox, *Bostock* is both a textualist ruling and an anti-textualist ruling at once.

### 3. Legal Justice's Positive Law Content

*Bostock*'s indications that its readings of Title VII's sex discrimination rule emerge from an extra-textualist principle of legal justice with pro-gay and pro-trans content imply a stance on what formal equality under law means for LGBT persons. Without more, it is not, strictly speaking, a defense of it.

How does *Bostock* know and defend its knowledge that legal justice requires LGBT persons to be treated just like cisheterosexuals? Lacking further authority for its concrete vision of legal justice, *Bostock* is a sitting duck, subject to attacks like those in the *Bostock* dissents that insist it problematically fills up Title VII's sex discrimination rule with judicial policy preference, judicial will, or the values of the *Zeitgeist*, cunningly but ultimately emptily passed off as what legal justice demands.<sup>140</sup> A

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139. A possible reply here is that legal justice—understood to implicate an abstract formal equality principle—may, on a certain account of it, be thought of as not simply a background rule-of-law rule governing statutory interpretation, but as a background rule-of-law rule that effectively supplies an implied term of statutory text. Recognizing the prospects of such an argument in the context of *Bostock* and Title VII, it still leaves *Bostock*'s pro-LGBT specification of the abstract formal equality principle to consider. Before *Bostock* anyway, as a positive law matter, the pro-LGBT specification of the abstract ideal of legal justice was not a basic rule-of-law condition, meaning that it—if not the abstract principle of formal equality from which it derives—remained at the time of decision in *Bostock* an extra-textualist value. *Bostock*'s reliance on it is thus an extra-textualist consideration inconsistent with its self-representation as an uncomplicatedly “straightforward” textualist ruling grounded in nothing more than Title VII's “plain” or “clear” statutory text. *Id.* at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”); *id.* at 1737 (“The answer is clear.”). Thanks to Robin West for engagement on this point.

140. *Id.* at 1751. An approximation of this view that mentions “justice” is this observation from Justice Kavanaugh's dissent that: “Some will surmise that the Court succumbed to ‘the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others.’” *Id.* at 1836 (Kavanaugh, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting)). For some additional views along these lines, see *id.* at 1824; *id.* at 1755–56 (Alito, J., dissenting).

sharper version of this critique characterizes *Bostock* as illegitimate and lawless, a power grab by a majority of the Supreme Court that has stolen the authority of the American people's congressional representatives, appropriating their legislative power—no longer legitimate authority because in the Court's hands—to use it for the Court's own ends.<sup>141</sup>

Contrasted with the charges of extra-textualism, which stick because of how *Bostock* imbues Title VII's text with meaning from outside of it via its pro-gay and pro-trans vision of legal justice, the broader attacks on *Bostock* as illegitimate and lawless fail. *Bostock*'s ideal of legal justice, with its position on LGBT equality within it, tracks, and is finally justified by, authoritative legal supports. But these supports do not themselves emerge from Title VII's text.

To say this is to invoke the authority of the Supreme Court's pro-LGBT constitutional rights jurisprudence. Over objections at every step, this body of law is now settled, legitimate, and fully law-bound.<sup>142</sup> Justice Kennedy's swansong LGBT rights opinion for the Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which recognized the constitutional rights of faithful conservatives, went out of its way to reaffirm the foundations of his signature jurisprudential handiwork, including its high watermark, *Obergefell v. Hodges*, affording lesbian women, gay men, and, by extension, trans people equal marriage rights.<sup>143</sup> *Masterpiece Cakeshop* featured consensus on the

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141. For some earlier examples of charges like these in the Court's decisions involving LGBT rights, see *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court . . . that has largely signed on to the so-called homosexual agenda . . . . It is clear . . . that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."); *United States v. Windsor*, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting) ("This case is about . . . the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."); *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) ("[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?"); *id.* at 713–14 (Scalia, J., dissenting) ("Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.").

142. See *infra* Part II.B.3.b.

143. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (holding that "official expressions of hostility to religion" by state commissioners, subsequently undisavowed, "were inconsistent with the Free Exercise Clause" of the First Amendment); *id.* at 1727 (approving constitutional protections for "gay persons and gay couples," and citing *Obergefell v. Hodges*, 576 U.S. 644 (2015), positively); *Obergefell*, 576

Court on *Obergefell*'s authority, securing it and steeling the cases in the constitutional line it built on against future legal attack.<sup>144</sup>

Conspicuously, even the *Bostock* dissents abide that consensus. Nothing they say openly breaks from it. Thus, the dissents reject the *Bostock* majority's interpretation of Title VII's sex discrimination ban, but without expressly casting doubt on the Supreme Court's pro-LGBT constitutional rulings.<sup>145</sup>

More curious is the *Bostock* Court's own treatment of those cases. *Bostock*, knowing all about the Supreme Court's pro-LGBT constitutional rights decisions, does not mention any of them by name, much less in engage them in any detail.<sup>146</sup>

Under different circumstances, this elision might indicate that *Bostock* has nothing to do with that body of law. The conclusion is unwarranted in this instance, no matter how many of *Bostock*'s readers practically credit it by treating *Bostock* as the strict textualist ruling that it announces it is.<sup>147</sup> Regarded this way, *Bostock*'s textualism appears to

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U.S. at 680 ("The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.").

144. See Spindelman, *Masterpiece Cakeshop's Homiletics*, *supra* note 108, at 373 (discussing the consensus in *Masterpiece Cakeshop* on *Obergefell*); see also *Bostock*, 140 S. Ct. at 1823 (Kavanaugh, J., dissenting) ("The Court has previously stated, and I fully agree, that gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'") (citing *Masterpiece Cakeshop*, 138 S. Ct. at 1727)).

145. A recent, widely noted salvo by Justice Clarence Thomas, joined by Justice Alito, expresses serious concerns about *Obergefell*'s impact on faithful conservatives. *Davis v. Ermold*, 141 S. Ct. 3 (2020) (statement of Justice Thomas, joined by Justice Alito, respecting the denial of certiorari). While this statement has been read as a challenge to *Obergefell*'s foundations, see, e.g., Joan Biskupik, *With Court in Flux, Thomas and Alito Attack Same-Sex Marriage Ruling*, CNN.COM, Oct. 5, 2020, <https://www.cnn.com/2020/10/05/politics/thomas-alito-obergefell-same-sex-marriage-analysis/index.html> [<https://perma.cc/2FNC-3KNG>], and may actually imply it, on a tight reading, it stops short of that, calling instead for next-generation protections for faithful conservatives in light of *Obergefell*. The problems flagged by Justice Thomas's statement in *Davis* would, of course, be solved by overturning *Obergefell*, but it is telling that, assuming Justices Thomas and Alito would approve that conclusion, their intervention, which stops short of calling the question, may be at least in part a function of an awareness that, for the time being anyway, the prospect is lost. *But see id.* ("It is not as easy to declare — as it was just a month ago — that the high court is unlikely to reverse the milestone decision [*Obergefell v. Hodges*] that now seems woven into American life.").

146. *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence*, 539 U.S. 558; *Windsor*, 570 U.S. 744; *Obergefell*, 576 U.S. 644.

147. See, e.g., Grove, *supra* note 2, at 267 (accepting that *Bostock* was a case about "textualisms," namely the "formalistic textualism" of the majority, and the "flexible

be independent of the Supreme Court's pro-LGBT constitutional rights jurisprudence.

Various signs in *Bostock* contraindicate these appearances. *Bostock* does not expressly say it is following the Supreme Court's pro-LGBT constitutional rights decisions, nor does it expressly invoke those decisions as support for its conclusion, including its legal justice rationale. By deed, however, if not by direct words, *Bostock* weaves their deeper logics into its ruling.<sup>148</sup> In this way, the Supreme Court's pro-LGBT constitutional rights jurisprudence provides *Bostock* with its epistemic content. It is the means by which *Bostock* knows that legal justice requires Title VII's sex discrimination rule to be read to provide LGBT and non-LGBT persons the same treatment under the law.

A modest, initial indication of how *Bostock* constructs its holding atop the Supreme Court's pro-LGBT constitutional rights precedents—or more exactly their effects—hides in the opinion in plain sight. As it is explaining why sexual orientation discrimination is sex discrimination, *Bostock* conjures a hypothetical in which a married lesbian employee—who happens to be a “model” employee—is discriminated against because of her marriage to her “wife.”<sup>149</sup> In context, the hypothetical goes to show that, but for this employee's sex, she would not have suffered discrimination, making what happened to her sex discrimination under Title VII's rules.<sup>150</sup> In context, there is nothing extraordinary about this maneuver. Without any fanfare, *Bostock* treats same-sex marriage as a commonplace of social and legal life that can be casually invoked—and leveraged—along the way to its doctrinal account.

*Bostock* provides other deeper, and more significant textual signs that its vision of legal justice and thus its pro-gay and pro-trans interpretation of Title VII's sex discrimination ban conform to the Court's pro-LGBT constitutional rights cases. If, from one point of view, this makes the formalities of *Bostock*'s decision not to cite or engage the Court's pro-LGBT constitutional rights precedents seem somewhat

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textualism” of the dissents). For additional examples, see sources cited *supra* note 2.

148. A template is in *Obergefell*. See, e.g., 576 U.S. at 675–76 (“[T]he State laws challenged by the Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”).

149. *Bostock*, 140 S. Ct. at 1742 (discussing hypothetical of a “model employee” who might be a woman with a “wife”). For another relevant passage, see *id.* at 1751 (citing Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583–584 (1973)).

150. *Id.* at 1742 (rounding out the point).



beside the point, it is not for that reason alone unimportant. The Court's evasion remains tactically useful in other respects.<sup>151</sup>

The turning-point decisions in the Court's pro-LGBT constitutional rights line—*Lawrence v. Texas* on sexual intimacy and *Obergefell v. Hodges* on the right to marry—raise their decisional curtains on legal stages set by even earlier constitutional precedents involving sexual privacy and marriage rights that, in their origins, were deeply cisheterosexualized.<sup>152</sup> *Lawrence* and *Obergefell* engage the heterosexualized dimensions of the earlier cases not in order to reaffirm them and the erstwhile heterosexual exclusivity of constitutional sexual privacy or constitutional marriage rights that they entailed. Instead, *Lawrence* and *Obergefell* acknowledge these features of the earlier rulings in order to call them out and to reconstitute them in pro-lesbian and pro-gay terms—terms that, in their extensions, render sexual orientation identity and sex, more generally, irrelevant to who gets legal rights.<sup>153</sup> Among the practical consequences of these maneuvers is how, in rendering sex a non-defining condition for legal treatment in the cases, they yield trans sexual intimacy and marriage rights.<sup>154</sup>

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151. See *infra* note 184 and accompanying text; see also *infra* Part III.B.

152. See *Lawrence*, 539 U.S. at 564–66 (discussing earlier constitutional privacy decisions); *Obergefell*, 576 U.S. at 663–76 (discussing earlier constitutional marriage rulings).

153. See Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1630 (2004) [hereinafter Spindelman, *Surviving Lawrence v. Texas*] (“Translated: the [*Lawrence*] Court vindicates sexual liberty by recognizing heterosexuals’ sexual rights and advances ‘equality of treatment’ by extending that liberty to lesbians and gay men.”). For additional relevant discussion, see Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1082–84 (2004) (engaging *Lawrence v. Texas*, its treatment of the sex “inequality on the face of the [Texas sodomy] statute” that was at issue in the case, and the way in which “[s]ex equality was *Lawrence*’s ‘road not taken’”).

154. See Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 561 (2003) (noting that *Lawrence v. Texas* may have rendered prior concerns about the enforcement of Texas’s “Homosexual Conduct Statute” against transgender individuals “moot”). For views in more cross-cutting directions, see Paisley Currah, *The Other “Sex” in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 321, 322 (2004) (noting that “*Lawrence* . . . does not end the state’s ability to police the very definition of male and female,” allowing the state to continue its “role as a central defender of the ideological coherence of the boundaries between the categories of male and female” and “the continuation of a legal regime in which transgender people are denied equality before the law”); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 311, 328 (2005) (suggesting that trans people may be implicated by *Lawrence* and its end to “criminal stigmatization of one type of consensual adult sexual activity,” but recognizing *Lawrence*’s logic affirms harmful “systems of regulating gender, sexuality, and family structures through violent and punitive

*Lawrence* and *Obergefell* thus make the history they do by broadening rights announced in earlier rulings in ways that ensure they conform to the Court's newfound understanding of the equal dignity, worth, and first-class constitutional stature of lesbian women and gay men, consistent with substantive due process and equal protection guarantees.<sup>155</sup> The legal breakthroughs in these cases proceed from the recognition that lesbian women and gay men, and trans people by implication, possess the essential attributes of constitutional personhood involved in the foundational sexual privacy and right to marry rulings as much as cisheterosexuals do. Rights originally recognized for cisheterosexuals lose their exclusive cisheterosexual orientation, becoming general rights that all these people—straight, lesbian, gay, cis, and trans—are entitled to enjoy equally.

Moreover, as *Lawrence* makes very plain and as *Obergefell* makes plain enough, these conclusions do not simply vindicate the constitutional rights of LGBT persons.<sup>156</sup> The principled, broadened rearticulations of constitutional rights in these cases solidify the basic legal foundations on which they rest. *Lawrence* and *Obergefell*'s shared project of generalizing and neutralizing established constitutional rights keeps those rights from being exposed or undermined as unprincipled forms of special constitutional pleading. Following *Lawrence* and *Obergefell*, sexual intimacy and marriage rights can no longer be doubted or dismissed as identity-based power plays delivered by, and on behalf of, the socially powerful that, in their partiality, fail the conditions of neutral, principled

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mechanisms"). For the point in relation to *Obergefell*, see generally Broadus, *supra* note 4.

155. See, e.g., *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); *Obergefell*, 576 U.S. at 672 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles."); see also *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) ("I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

156. A more comprehensive account of this point is in Spindelman, *Surviving Lawrence v. Texas*, *supra* note 153, at 1619–32 (noting the ways in which *Lawrence* is about an affirmation of heterosexual rights). Justice Anthony Kennedy's majority opinion in *Obergefell* makes the point for itself when it observes that the same-sex couples involved in the case do not mean to disparage marriage through their constitutional claims, but rather seek to affirm it. *Obergefell*, 576 U.S. at 681 ("It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves.").

constitutional adjudication required by the rule-of-law.<sup>157</sup>

While *Lawrence* and *Obergefell* are thus rightly touted as pro-LGBT victories, they nevertheless vitally partake of “interest convergences” that link the constitutional rights and fates of LGBT persons to those of cisheterosexuals—and the other way around.<sup>158</sup> Constitutional persons all, they stand together as one with equal rights under—and before—the law. Hardly irrelevant, the elimination of the cisheterosexual exclusivity of the earlier sexual intimacy and marriage right protections is accomplished by rulings that preserve and leverage their underlying cisheteronormativity. Rights once tailor-made for cisheterosexuals are now equally available to everyone.

Returning to *Bostock*, the Court’s majority opinion replicates *Lawrence* and *Obergefell*’s maneuvering, but on statutory interpretation terrain. *Bostock* commences its initial textualist gambit by placing Title VII’s sex discrimination rule and key, earlier Supreme Court decisions

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157. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (discussing the importance of principled decision-making by the courts). It is worth noting that the account being provided here reverses and dynamizes thinking that “[t]he rule of law is ordinarily understood to be a basic condition for the legitimacy of liberal states,” with “[i]ts demands . . . expressed in provisions of the U.S. Constitution like the Due Process and Equal Protection Clauses.” Gowder, *supra* note 36, at 1024. For a similar perspective on rule-of-law values being basic to constitutional values, see, for example, WEST, *supra* note 3, at 4 (2003) (“The prominence of this understanding of law’s essence — that law, and the Rule of Law, simply *is* that which protects individual freedom from political overreach — unites and perhaps partly explains a good deal of contemporary constitutional law: it provides the unstated major premise of particular interpretations of quite general constitutional phrases.”); *id.* at 5–6 (“A Rule of Law that fears politics, and that crafts a Constitution so as to disable politics, does so, because of the latter’s essential, irredeemable irrationality . . . .”); *id.* at 58–59 n.1 (noting that the rule of law encompasses constitutionalism). Justice Sandra Day O’Connor made note of the relevant point in her separate opinion in *Lawrence*, 539 U.S. at 584–85 (O’Connor, J., concurring) (“[S]o long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”); *id.* at 585 (quoting from *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring), including the observation that, “[t]he framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally”).

158. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing the idea of “interest convergence” in the context of racial equality, observing that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites”). For a discussion of “interest convergences” in *Bostock*, see Jeremiah A. Ho, *Queering Bostock*, J. GENDER SOC. POL’Y & L. (forthcoming 2021) (manuscript at 75–83) (on file with author).

interpreting it squarely in view.<sup>159</sup> *Bostock*'s review of the relevant authorities indicates that, as originally written, Title VII and its caselaw were for and in the interests of cisheterosexuals, a point to which the opinion returns when it discusses how, at the time of its enactment, the law reflected certain group-based power arrangements—of cisheterosexuals over lesbian women, gay men, and trans people.<sup>160</sup> In doing so, *Bostock* fails to take critical note of cisheterosexuality's own hierarchical construction by sex. This feature of the opinion need not be applauded, but, in context, it appears to reflect the Court's wish to highlight—and not bury—Title VII's historical cisheterosexual exclusivity, its traditional exclusion of lesbian women, gay men, and trans people.<sup>161</sup> *Bostock*'s focus on that unhappy tradition—itself a reminder of how the Court's interpretation of Title VII did not openly break with it until this case—is, at long last, the occasion for doing just that.<sup>162</sup> *Bostock* abandons any defense of the old ways as it witnesses this feature of legal history while also parting ways with it. *Bostock*'s vision of legal justice provides the idealized terms the opinion relies on to perform this “unexpected” rupture with Title VII's legal past—a rupture that reformulates the statute's present and its future.<sup>163</sup> By eliminating the cisheterosexual exclusivity of Title VII's sex discrimination ban, *Bostock* generalizes and neutralizes the law while conforming it to the dictates of legal justice, which it understands to require lesbian women, gay men, and trans people to be treated under this law exactly like cisheterosexuals are.

Similarly in step with the Supreme Court's pro-LGBT constitutional rights jurisprudence is how *Bostock*'s legal justice rationale spawns pro-gay and pro-trans statutory interpretation holdings that deliver LGBT rights while proudly and conspicuously safeguarding the rights of cisheterosexuals. Rebuffing arguments for Title VII's sex discrimination

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159. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1739–44 (2020).

160. *See id.* at 1751 (talking about “homosexual and transgender employees in the 1960s” as “groups that were politically unpopular at the time of the law's passage”).

161. For some illumination of cisheterosexuality's hierarchical construction by sex that configures reasons why *Bostock*'s elision of it in the setting of a sex discrimination ruling should not be applauded, see sources cited *supra* notes 76, 114.

162. *Oncale v. Sundowner Offshore Services., Inc.*, 523 U.S. 75 (1998), may be thought of as an exception insofar as it opened the door for anti-gay and anti-trans sex discrimination claims, as discussed in part as to anti-gay sex discrimination, including harassment, claims, in Spindelman, *Sex Equality Panic*, *supra* note 59.

163. *Bostock*, 140 S. Ct. at 1751.

rule's cisheterosexual exclusivity, *Bostock* repeatedly notes how, in principle, defense positions for that conclusion would have unacceptably cast doubt on sex discrimination protections that cisheterosexuals have long enjoyed.<sup>164</sup> Sexual harassment law and motherhood discrimination protections lead the list, but protections that cisheterosexual men have received against sex discrimination, including against same-sex sexual harassment, are also in view.<sup>165</sup> Preserving these rules and the legal benefits that they confer not because they are actually in any legal danger, but because this is what *Bostock*'s understanding of legal justice requires, *Bostock* extends them to lesbian women, gay men, and trans people. As it does so, *Bostock* categorically refuses to allow Title VII's sex discrimination ban to be exclusively for the benefit of cisheterosexuals. The law's underlying cisheteronormative torque, however, is not itself removed.

Here is one final check to allay any lingering doubts about whether *Bostock*'s pro-gay and pro-trans vision of legal justice hews to the path marked by the Court's pro-LGBT constitutional jurisprudence. As in that jurisprudence, *Bostock* places the burden of persuasion in its ruling on those who oppose formally equal treatment for LGBT persons under law. *Bostock* treats defense positions that are at odds with the implications of its legal justice rationale with active skepticism. In effect, *Bostock* requires defenders of gay-exclusive and trans-exclusive readings of Title VII to bear the burden of overcoming the opinion's call for formal legal justice for LGBT persons under the law.<sup>166</sup>

Seen this way, despite earlier appearances, *Bostock*'s distribution of persuasive responsibility is not a debater's trick by which the Court's

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164. See, e.g., *supra* Part II.A.1; see also, e.g., Spindelman, *The Shower's Return: Part I*, *supra* note 9, at 83–84; Spindelman, *The Shower's Return: Part III*, *supra* note 9, at 107–10. Complicating matters was that, while defense arguments in the case sought to exclude lesbian women, gay men, and trans people from sex discrimination protections, there were offerings in defense positions that insisted this was not a total exclusion of these individuals from statutory sex discrimination protections. See Brief for the Petitioner at 25–31, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107) (suggesting that a sex discrimination claim, not a “transgender status” discrimination claim, was still available to Aimee Stephens, though not successfully advanced); Brief for Petitioners Altitude Express, Inc. and Ray Maynard at 45, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2019) (No. 17-1623) (maintaining that Title VII does not bar sexual orientation discrimination, but suggesting that “[g]ays and lesbians, no less than heterosexuals, may prevail on sex-discrimination claims,” pointing to sex stereotyping as an example).

165. Here is a return to the discussion earlier in *supra* Part II.A.1.

166. Two examples have already been discussed. See *supra* Parts II.A.1–2.

opinion dodges legal accountability for its own positions. Against the backdrop of *Bostock*'s legal justice rationale, the allocation of persuasive responsibility reflects what legal justice—in step with the Court's pro-LGBT constitutional caselaw—would ordinarily be thought to require: a strong, but not yet wholly irrebuttable, presumption of legal equality for LGBT persons and their cisheterosexual counterparts.

Like *Bostock*'s position respecting the formal equality of cisheterosexual, lesbian, gay, and trans persons under law, its decision to set its formal equality presumption where it does and to make that rule hold absent sufficiently powerful countervailing arguments lines up with the instructions in the Supreme Court's pro-LGBT constitutional jurisprudence. Across that body of law, the Court places the burden of persuasion—and justification—on state actors who would defend laws differentiating between and among LGBT and non-LGBT persons in ways that give LGBT people fewer legal rights and protections than their non-LGBT counterparts receive.<sup>167</sup>

Of course, the private party defendants in *Bostock* are not state actors subject to the U.S. Constitution's strictures. Through their lawyers, who are officers of the Court, though, they would have had the Court—and the Justices, plainly state actors—deploy the Court's institutional authority in ways that would have affirmed Title VII's sex discrimination rule as cisheterosexually exclusive.<sup>168</sup> That reading of the statute involves

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167. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that Colorado failed to carry its burden of proving Amendment 2 was “directed to any identifiable legitimate purpose or discrete objective,” and rejecting Colorado’s “primary rationale” for the measure); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”); *id.* at 578 (describing the rights of “petitioners . . . to respect for their private lives,” and noting that “[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government,” and then commenting that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”); *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015) (“The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe.”); *id.* at 681 (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court must also hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”)

168. *See* WEST, *supra* note 3, at 20 (explaining that “[j]udges, acting independently of ‘the

an exercise of state power that operates in formally unequal ways as between lesbian women, gay men, and trans people, on the one hand, and cisheterosexual women and men, on the other. Before taking that action, the *Bostock* Court—in keeping with the instructions of its pro-LGBT constitutional rights jurisprudence—puts the justifications for that reading of Title VII to the test.

a. Legal Justice—Constitutional Justice—Legal Justice, Again

Following the Supreme Court's pro-LGBT constitutional rights jurisprudence and drawing authority from it, *Bostock*—including both its ideal of legal justice and other aspects of the opinion that derive from, or, anyway, that correspond to it—is on solid legal ground. While *Bostock* neither expressly cites nor discusses any of the Supreme Court's pro-LGBT constitutional rights rulings, it does not have to for it to adhere to their teachings in ways that make *Bostock* a legitimate and lawful ruling, if not precisely on the textualist terms that it propounds.

One risk that this understanding of *Bostock* raises is how easily it can generate the misimpression that *Bostock* is an ordinary, constitutional pass-through ruling: in basic form, a constitutional decision that happens to be rhetorically dressed in rule-of-law legal justice and statutory interpretation terms.

The legal situation that *Bostock* reflects and produces is more nuanced than that—nuance that comes into view as the Supreme Court's pro-LGBT constitutional rights jurisprudence is followed to its own rule-of-law legal justice roots.

From the *Bowers v. Hardwick* dissents to the majority opinion in *Romer v. Evans*, the Supreme Court's pro-LGBT constitutional rights jurisprudence begins its constitutional practice by articulating legal rules that emerge from neither thin-air nothingness nor merely the Supreme Court's earlier privacy decisions.<sup>169</sup> These early LGBT-affirming rulings were constructed by reading the Court's earlier privacy decisions along

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state,' can thereby make real the otherwise illusory promise of a state whose power is limited by law,' and then noting the "dilemma" that "judges are *themselves* individuals, employed by the state, and hence are themselves 'state actors'"); *id.* at 21 ("To summarize: liberalism requires that the discretion of state actors be limited, and limited *by law*. Judges must enforce these limits, but judges are also themselves state actors whose discretion must be cabined."). This is not to forget the precise positions taken by the defense in the cases *Bostock* collects, on which see *infra* text accompanying notes 197–98.

169. See generally *Bowers v. Hardwick*, 478 U.S. 186, 199–214 (1986) (Blackmun, J., dissenting); *id.* at 214–20 (Stevens, J., dissenting); *cf. also Romer*, 517 U.S. 620.

with, and in light of, the abstract rule-of-law ideal of legal justice that broadly undergirds constitutional adjudication in the open textures of the Fourteenth Amendment.<sup>170</sup> First the *Hardwick* dissents and then the *Romer* majority opinion leveraged what at the time was an off-the-rack, proceduralist vision of legal justice—requiring, generally, that like cases and like persons be treated alike—in the course of articulating new constitutional formulations for how lesbian women and gay men should be treated as a matter of constitutional right.<sup>171</sup> Legal justice supplied

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170. And elsewhere. On the convergence between rule-of-law and constitutional principles, see *supra* note 157. See also, e.g., WEST, *supra* note 3, at 8 (“These ideas . . . constitute the dominant conception of the virtue of legal justice. . . . They also undergird large chunks of constitutional argument – the Constitution is our highest Law, and if the point of Law is to constrain and tame politics, and if politics is what sovereigns produce, then the point of the Constitution is to forbid certain outcomes by the political branches.”). On the porousness of rule-of-law principles to “nonlegal social facts,” which here may function as pass-throughs operating through background constitutional rules, see GOWDER, *supra* note 36, at 1025 (“Our rule-of-law judgments depend not merely on legal facts, like the language of legal rules or the actions of public officials, but also on the nonlegal social facts that give meaning to those legal facts.”). It could well be that “nonlegal social facts” encompass various iterations of political morality or first-order moral and/or ethical rules or values that thus underwrite both rule-of-law and constitutional norms and rules. See, e.g., WEST, *supra* note 3, at 110 (framing an argument involving the rule-of-law’s moral underpinnings); Ronald Dworkin, *A Special Supplement: The Jurisprudence of Richard Nixon*, N.Y. REV. BOOKS (May 4, 1972), <https://www.nybooks.com/articles/1972/05/04/a-special-supplement-the-jurisprudence-of-richard-/> [<https://perma.cc/K7KB-D5QL>] (discussing constitutional law’s normative moral underpinnings). If so, in a certain sense, morality and/or ethics might supply the relevant regulatory normativity—and the basis for legal management—all the way down. Thanks to Angela Harris for engagement on this point.

171. *Hardwick*, 478 U.S. at 218–19 (Stevens, J., dissenting) (“[E]very free citizen has the same interest in ‘liberty’ that the members of the majority share. . . . [T]he homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.”); *id.* at 206 (Blackmun, J., dissenting) (“[W]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”); *Romer*, 517 U.S. at 633 (“Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”). For precedent and stare decisis as rule-of-law concerns, see, for example, WEST, *supra* note 3, at 7 (describing “our dominant understanding of legal justice” as involving “the imperative that presses upon judges to ‘treat likes alike,’ or to follow precedent, or to comply with *stare decisis*”). It may be worth another thought about Justice Scalia’s sense that stare decisis is not a textualist value in this light. See *supra* note 53 and accompanying text. For the Aristotelian point, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542–43 (citing ARISTOTLE, *ETHICA NICOMACHEA* V.3.1131a–1131b (W. Ross trans. 1925), and ARISTOTLE, *METAPHYSICA* I.5.1055b–1056b (W. Ross trans. 1925)) (noting that “Aristotle, building on the work of Plato,” observed that, “[e]quality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in



these early rulings with a conceptual shell that shaped opinions recognizing that lesbian women and gay men were entitled to constitutional protections heterosexuals already received on both due process and equal protection grounds.

Carefully launching what would become a much larger and more significant constitutional sequence, *Romer* emblemizes this translational undertaking. *Romer* struck down a Colorado constitutional amendment that effectuated a categorical, class-based exclusion of lesbians and gay men (and other non-heterosexuals) from legal protections that were ordinary parts of public life in the state and that heterosexuals could and did take for granted.<sup>172</sup> *Romer* held that provision of the state constitution violated the Fourteenth Amendment's Equal Protection Clause.<sup>173</sup> *Romer*'s position was that the amendment's unprecedented, "[s]weeping," and "comprehensive" exclusion of lesbian women and gay men from the ordinary terms of legal life was an equal protection violation in a literal sense.<sup>174</sup> The political maneuvering that resulted in lesbian women and gay men being made into legal pariahs failed to recognize how they were entitled to the law's basic respects as constitutional persons just like heterosexuals.<sup>175</sup> This conclusion—expressing the minima that the *Romer* Court would tolerate as a matter of Equal Protection rules, themselves consistent with rule-of-law legal justice ideals—was modest, but highly significant.<sup>176</sup> In rejecting the idea

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proportion to their unalikehood").

172. *Romer*, 517 U.S. at 624 (setting forth the terms of the state constitutional Amendment); see also *id.* at 626–27 (discussing the Colorado Supreme Court's "authoritative construction" of the amendment).

173. *Id.* at 635–36 (announcing the holding in the case).

174. *Id.* at 627 (describing the measure as "[s]weeping and comprehensive"); *id.* at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."). For the argument in the *Romer* litigation, see Brief for Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan as Amici Curiae Supporting Respondents at 3–4, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008432 ("Amendment 2 is a rare example of a *per se* violation of the Equal Protection Clause. . . . Amendment 2 renders a 'class of persons' in Colorado completely ineligible for the protection of its laws from an entire category of mistreatment.").

175. See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996) ("[T]he principle we believe underlies *Romer* . . . [,] in a nutshell, forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection . . . or to no special protection . . .").

176. For early, prophetic commentary that puts its finger on *Romer*'s "radicalism," see

that lesbian women and gay men were categorically different from heterosexuals, this historic ruling paved the way for subsequent High Court decisions filling in and filling out the requirements of constitutional justice in ways that recognized that, far from being categorically different from heterosexuals, lesbians and gay men were like them in basic respects.<sup>177</sup> As decisions in *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges* deepened and widened the scope of *Romer*'s constitutional justice principles of LGBT equal treatment, a certain gap between what the original rule-of-law ideal of legal justice meant and what constitutional justice was coming to require, appeared—then grew.<sup>178</sup>

*Bostock* fits into the story at just this point. Without any ballyhoo and without specifying all the details of what it is up to, *Bostock* engages—and returns—the gesture from the foundations of the Court's pro-LGBT constitutional rights jurisprudence. On statutory interpretation terrain, *Bostock* practically affirms that principles of constitutional justice, as they have developed, remain principles of legal justice, too. In announcing its reading of Title VII's sex discrimination ban based on a conception of legal justice that draws authoritative supports from the Court's pro-LGBT constitutional rights decisions, *Bostock* leverages their vision of constitutional justice while announcing an updated, substantive account of legal justice that functions in the decision as an

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Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 61 (1997).

177. For one version of this difference principle, see *Bowers v. Hardwick*, 478 U.S. 186, 191, 194 (1986) (indicating that “[n]o connection between family, marriage, and procreation on the one hand and homosexual activity on the other” existed, and that arguments that same-sex intimacies were entitled to constitutional protections like those afforded to “family, marriage, and procreation” were “at best, facetious”).

178. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects . . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (holding that the challenged marriage laws “abridge central precepts of equality” because they denied same-sex couples “all the benefits afforded to opposite-sex couples” and this served to “disrespect and subordinate” gays and lesbians); see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“[G]ay persons . . . cannot be treated as social outcasts or as inferior in dignity and worth. . . . [T]he laws and the Constitution can, and in some instances must, protect them . . . . At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression[.] [a]s this Court observed in *Obergefell* . . . .”). On the relationship between constitutional and legal justice, see *supra* note 170.

operative rule-of-law rule. *Bostock* diffuses, proliferates, normalizes, and entrenches the idea that, in the U.S. rule-of-law system, legal justice now broadly requires LGBT persons to be treated just like cisheterosexuals.<sup>179</sup>

Of course, the strictures of constitutional justice persist after *Bostock*. They formally govern state action involving anti-LGBT discrimination. But now, in the age of *Bostock*, they have been supplemented by a new rule-of-law ideal of legal justice that, running alongside them, manages the wider operations of law and legal rules, including in cases involving the adjudication of extra-constitutional and sub-constitutional legal claims, like the statutory interpretation questions that *Bostock* involves.

In *Bostock*'s wake, a plaintiff no longer needs to advance a constitutional claim against arguably discriminatory state action against LGBT persons in order to receive the benefits of the constitutional promise of LGBT equal rights under law. That promise—embodied in *Bostock*'s pro-gay and pro-trans ideal of legal justice—is now also one that courts and other legal actors must heed when faced with any legal claim of right involving anti-LGBT discrimination.<sup>180</sup>

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179. For some suggestion of historical examples of constitutional norms getting out ahead of rule-of-law norms from which they derived, before being reincorporated back into them in their particularities, hence normalized and diffused, see WEST, *supra* note 3, at 40 (discussing relevant examples). Alternatively, it might just be that rule-of-law norms set legal minima that make at least some constitutional rules in a particularized sense supererogatory from a rule-of-law point of view—until that point in the development of the law when constitutional norms are returned to the rule-of-law the floor, which they then lift.

180. Some federal actors have already started hearing—and heeding—the call. Relevant federal judicial decisions in a growing list include: *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020) (“resoundingly” affirming that “equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender”); *Kasper ex rel. Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1292 (11th Cir. 2020) (holding that school district “policy barring Mr. Adams from the boys’ restroom [does not] square[] with the Constitution’s guarantee of equal protection and Title IX’s prohibition on sex discrimination”); *see also* *C.P. v. Blue Cross Blue Shield of Ill.*, No. 3:20-cv-06145-RJB, 2021 WL 1758896, at \*1 (W.D. Wash. May 4, 2021) (“The fundamental issue in this motion is whether a plaintiff who alleges that he was denied insurance coverage for medical treatment because he is transgender states a claim for sex discrimination under Section 1557 of the Affordable Care Act . . . . This Court finds that he does.”); *Ray v. McCloud*, No. 2:18-cv-272, 2020 WL 8172750, at \*1, \*8, \*8 n.9 (S.D. Ohio Dec. 16, 2020) (applying intermediate scrutiny in case involving trans equal protection claim); *infra* note 182. *But see* *Hennessy-Waller v. Snyder*, No. CV-20-00335-TUC-SHR, 2021 WL 1192842, 1, 8 (D. Az. Mar. 30, 2021) (denying minor plaintiffs’ request for preliminary injunction against enforcement of Arizona Medicaid policy that excluded gender reassignment surgery while indicating, in part, that *Bostock* involves only Title VII sex discrimination claims). For recent action by the Biden Administration and within it, see Exec. Order No. 13988, 86 Fed. Reg.

So much is encompassed by *Bostock*'s stated conclusion expressing what legal justice requires: "[A]ll persons"—understood in context to refer to cisheterosexuals, lesbian women, gay men, and trans people—are equally “entitled to the benefit of the law’s terms.”<sup>181</sup> “Law” in this setting is not merely a narrow, specific reference to Title VII’s sex discrimination ban, but an indication of “law” in a wide, rule-of-law sense.<sup>182</sup> LGBT

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7023 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf> [<https://perma.cc/RG3T-JYNH>]; Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, C.R. Div., Memorandum on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download> [<https://perma.cc/9AYK-SRDN>] (“Executive Order 13988 sets out the Administration’s policy that ‘[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.’”). The Trump Administration took a different perspective on *Bostock*’s scope. See, e.g., Chris Cameron, *Trump Presses Limits on Transgender Rights Over Supreme Court Ruling*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/us/politics/trump-transgender-rights-homeless.html> [<https://perma.cc/C534-8HQN>]; Chris Johnson, *How the Trump Administration Is Getting Around Bostock to Allow Anti-Trans Discrimination*, WASHINGTON BLADE, Sept. 16, 2020, <https://www.washingtonblade.com/2020/09/16/how-the-trump-administration-is-getting-around-bostock-to-allow-anti-trans-discrimination/> [<https://perma.cc/B4RK-B32A>]. Proposed federal legislation includes the Equality Act, H.R. 5, 117th Cong. § 2(a)(1) (2021) (making clear that sex discrimination includes discrimination that “occur[s] on the basis of the sex, sexual orientation, gender identity, pregnancy, childbirth, or a related medical condition of an individual, as well as because of sex-based stereotypes,” and noting that the measure builds on, extends, and “makes explicit” *Bostock*’s holding that anti-gay and anti-trans discrimination are sex discrimination); see Equality Act, S. 393, 117th Cong. § 2(a)(1) (2021) (same).

181. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1751 (2020).

182. *Bostock* is thus not simply “persuasive” authority on the meaning of state laws, including state anti-discrimination measures, that contain express sex discrimination provisions. *Bostock*’s rule, on this view, is a thicker, operative rule-of-law rule that has normative force that should drive legal understandings of those state law rules. For some movement in these directions in state courts, see, for example, *People v. Rogers*, 950 N.W.2d 48 (Mich. 2020) (vacating a prior judgment of the Michigan Court of Appeals finding that “gender” in Michigan’s criminal ethnic-intimidation statute did not encompass intimidation “motivated by the fact that a person is transgender,” *People v. Rogers*, 951 N.W.2d 50, 57–59 (Mich. Ct. App., 2020), and remanding to that court for reconsideration in light of *Bostock*); *Tarrant Cnty. Coll. Dist. v. Sims*, No. 05-20-00351-CV, 2021 WL 911928 at \*4 (Tex. Ct. App. Mar. 10, 2021) (“In order to reconcile and conform the [Texas Commission on Human Rights Act (TCHRA)] with federal anti-discrimination and retaliation laws under Title VII, we conclude we must follow *Bostock* and read the TCHRA’s prohibition on discrimination “because of . . . sex” as prohibiting discrimination based on an individual’s status as a homosexual or transgender person.” (quoting TEX. LAB. CODE ANN. § 21.051 (West))). For an example of state legislative action in the same directions, see S.B. 119, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (amending certain provisions of the Ohio Revised Code “to enact the Ohio Fairness Act to prohibit discrimination on the basis of sexual orientation or gender identity or expression”); *id.* (“For purposes of the Revised Code, any provision respecting sex discrimination includes discrimination because of a person’s sexual orientation

equality—including a deep and broad presumption of an entitlement to the same legal treatment that cisheterosexuals receive—is thus now the rule-of-law's, not just constitutional law's, standard fresh air, the setting within which legal judgments about LGBT rights and equality are to be made.<sup>183</sup>

This, then, is a snapshot of the legal schematic that *Bostock* effectuates: *Bostock*'s ideal of legal justice occupies a kind of constitutional "advance position." It stands out ahead of—and at a certain distance from—the constitutional rules that give it authoritative legal force, but without themselves being directly and immediately implicated or at stake. This is why *Bostock* can declare for the first time ever that legal justice requires state actors, including courts, to afford LGBT persons equal access to legal rights claims under Title VII's sex discrimination ban, without forcing legal argument to work within any constitutional grooves. The erstwhile, strictly constitutional justice requirement that LGBT and non-LGBT persons be treated formally just like one another by the state is honored as a function of what legal justice commands. Presented with no strong countervailing reasons for overcoming legal justice's presumption of equal treatment, courts and other legal actors are to act just as *Bostock* does when it reads Title VII's sex discrimination rule in pro-gay and pro-trans ways.

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or gender identity or expression."'). This does not mean that there will not be questions, indeed, challenging questions, about how to follow *Bostock*'s rule-of-law rule of LGBT equal treatment, particularly but not only in jurisdictions that, unlike the federal system at the time of decision in *Bostock*, prohibited sex discrimination and anti-LGBT discrimination on separate lines. Cf. Kyle C. Velte, *The Nineteenth Amendment as a Generative Tool for Defeating LGBT Religious Exemptions*, 105 MINN. L. REV. 2659, 2703–06 (2021) (discussing pattern of state public accommodations laws). Nor does it in any way forget the wave of anti-trans legislation in state legislatures that has come in *Bostock*'s wake, hard to square with its rule-of-law promises of formal equality for trans people. See, e.g., Wyatt Ronan, *2021 Slated to Become Worst Year for LGBTQ State Legislative Attacks as Unprecedented Number of States Poised to Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law*, HRC.ORG (Apr. 22, 2021), <https://www.hrc.org/press-releases/2021-slanted-to-become-worst-year-for-lgbtq-state-legislative-attacks> [<https://perma.cc/TW2V-9VMW>] (tracking state anti-LGBTQ bills, many of which are anti-trans).

183. This does not mean that LGBT claims and positions will always prevail against counter-claims that also implicate legal justice or other rule-of-law values. For limits that *Bostock* itself contemplates, see, for example, *Bostock*, 140 S. Ct. at 1754 ("[H]ow . . . doctrines protecting religious liberty interact with Title VII are questions for future cases too. . . . [W]hile other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.'). For further discussion of the point, see *infra* text accompanying notes 208–09, 231–34.

But notice: Nothing in *Bostock* ever places Title VII's sex discrimination ban, or Title VII more generally, into any sort of constitutional peril or doubt. Not even close. *Bostock* thus does not neatly fit into the category of "constitutional avoidance" decisions.<sup>184</sup> It occupies a new and different kind of legal space, hence the idea of legal justice sitting in a kind of constitutional advance position, well out in front of conventional constitutional claims.

b. Legal Justice's Phenomenology: *Bostock*'s Textualism as Experience

Having come this far, it looks as though *Bostock*'s extra-textualist achievements are on a collision course with *Bostock*'s self-presentation as a textualist ruling. That is right—to a point. At the same time, however, *Bostock*'s extra-textualist features also recast and help explain *Bostock*'s textualism in a somewhat different light.

*Bostock*'s textualism centers on its conviction that, "[a]t bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings."<sup>185</sup> *Bostock* returns to this position later on when—just before putting its ideal of legal justice into play—it announces that it wishes to preserve, and not "abandon[, its] role as [a statutory] interpreter."<sup>186</sup> This disavowal ironically captures what *Bostock*, in fact, proceeds to do when it identifies legal justice as a normative interpretive guide. Forthcoming like this, *Bostock* acknowledges that it is not simply discovering—but actively crafting—Title VII's text. The opinion's self-image as a faithful interpreter of the statute's plain meaning is thus wish fulfillment in the Freudian sense.<sup>187</sup>

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184. For some relevant discussion of the constitutional avoidance canon, see SCALIA & GARNER, *supra* note 53, at 426. While *Bostock* itself does not raise or come close to raising any suggestion that Title VII's sex discrimination ban was in any zone of constitutional danger or doubt, saying all this does not miss how an anti-sex-discrimination statute that expressly excluded lesbian women, gay men, and trans people from its protections would raise very serious constitutional questions—both before and after *Bostock*. Further thoughts along these lines are discussed *infra* Part III.A.

185. *Bostock*, 140 S. Ct. at 1743.

186. *See id.* at 1751. There is also the prospect that wrapping itself in the authority of its own pro-LGBT constitutional decisions would place a bullseye on them at a moment when their own security and stability had finally seemed to be largely beyond doubt. *But see supra* note 145.

187. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 32 (James Strachey trans. & ed., W.W. Norton 1989) (1930) ("[E]ach one of us behaves in some one respect like a paranoic, corrects some aspect of the world which is unbearable to him by the construction of a wish and introduces this delusion into reality.").

An important truth lurks in this account, nevertheless—at least if one treats *Bostock*'s self-description as textualist phenomenologically, as a report on the judicial experience of reading Title VII's text in the context of the claims that *Bostock* involves. There are, after all, conditions of interpretive constraint shaped by authoritative texts that are now visibly a part of the legal landscape that *Bostock* engages.<sup>188</sup> If *Bostock*'s interpretivism founders where the opinion offers its legal justice rationale, it is in the authority beneath that rationale—the Court's pro-LGBT constitutional rights decisions—that one discovers a foundation for the judicial experience that *Bostock* effectively describes: of feeling interpretively boxed in.<sup>189</sup>

The Supreme Court's pro-LGBT constitutional rights decisions are fairly characterized in terms that *Bostock* uses to describe Title VII's sex discrimination ban. Taken as a larger set, these decisions now look to be “clear,” “straightforward,” “plain,” and “settled” on the basic question of lesbian and gay formal equality, with *Bostock* itself putting to rest whatever questions may have been lingering on the status of trans equality within that body of law.<sup>190</sup> Seen generally along these lines, the Court's pro-LGBT constitutional rights jurisprudence does more than supply *Bostock*'s legal justice ideal with authoritative content. It does that in ways that both structure and drive the Court's selection from among the interpretive options before it, making *Bostock*'s result, however “unexpected” it may have been, feel legally foreordained.<sup>191</sup>

To recognize this is not to deny that *Bostock*'s final gloss on Title VII is the product of interpretive choices that the Court has made. However strong a driving force underneath the *Bostock* decision, the Court's pro-LGBT constitutional rights jurisprudence does not and could not in any simple way dictate *Bostock*'s results. Short of that, however, the rules of those decisions and their pro-LGBT trajectories are powerful enough to serve as a meaningful contouring guide, capable of

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188. For a larger account framing a phenomenology of judging from a critical perspective that also has the rule of law in its sights, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION, FIN DE SIÈCLE* 169–71 (1997) (discussing the experience of judging and interpretive constraint in relation to the indeterminacy critique).

189. See, e.g., *Bostock*, 140 S. Ct. at 1751 (invoking the “tilt” of “the scales of justice”); *id.* at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”).

190. *Id.* at 1737 (“clear”); 1743 (“straightforward”); *id.* (“plain”); *id.* (“settled”); see also *supra* note 154.

191. *Bostock*, 140 S. Ct. at 1751.

conditioning the approach and the answers to the statutory interpretation questions *Bostock* involves and resolves. The Court's pro-LGBT constitutional rights decisions push toward—or even shove in the direction of, if they do not strictly require—*Bostock*'s bottom line.

If not precisely on the terms that *Bostock* claims, it is possible, then, to account for *Bostock* as involving interpretations of Title VII's sex discrimination ban that are produced by an experience of anterior textual constraint. It is just that that constraint is found not in Title VII's text, as *Bostock*'s textualism suggests, but in the texts that are beneath *Bostock*'s anti-textualist, legal justice rationale. Strange as this may sound, *Bostock*'s textualism may be thought to conform to—and not simply be entirely at right angles with—its anti-textualist dimensions. To a limited degree, *Bostock*'s anti-textualism harmonizes with, and helps to explain, its textualist results.<sup>192</sup>

At the same time as *Bostock*'s anti-textualist dimensions help make sense of its textualist conclusions, they do not finally provide a rationalization for *Bostock* on its own textualist terms. Nor could they. Far from singularly operating as *Bostock*'s textualism's negation, though, *Bostock*'s anti-textualist features go to show the complex and subtle interrelations amidst the elements of *Bostock*'s textualist/anti-textualist paradox.

These dynamics also hold true in reverse in a relevant sense. *Bostock*'s textualism and its vision of the possibilities of textual determinacy shore up a conventionally deterministic approach to legal authority that itself underwrites the anti-textualist features of *Bostock*'s text, specifically, the sense that the Court's pro-LGBT constitutional rights jurisprudence can be described as a steady and fixed, if still evolving, body of law that has now, through and with *Bostock*, underwritten a transformation in what the rule-of-law ideal of legal justice requires, not just as a matter of constitutional right but of more general legal obligation within our wider U.S. rule of law regime.

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192. All these moves, of course, are intensely fraught from the point of view of the indeterminacy thesis, particularly its hard forms, as noted *supra* note 6.



### III. *BOSTOCK* RECONFIGURED: THE DISSENTS AND SOME UNANSWERED QUESTIONS

#### A. *The Dissents*

How do the *Bostock* dissents by Justices Alito and Kavanaugh hold up in this light?

Initially, a compressed treatment of both of the *Bostock* dissents looks past their differences to their shared effort to pin their textualist conclusions on their understandings of the original, “ordinary public meaning” of Title VII’s sex discrimination rule.<sup>193</sup> While the dissents fill out their reasoning in different ways—ways that obviously matter to the dissenting Justices themselves—both of them make the ordinary public meaning of Title VII’s sex discrimination ban at the time it was enacted a conceptual centerpiece of their rulings, sufficient for the interpretive conclusions that they reach.<sup>194</sup> Because Title VII’s sex discrimination ban, by its historical terms, announced a cisheterosexual-exclusive rule, the dissents reason, it did not and does not cover anti-gay or anti-trans discrimination as sex discrimination today.<sup>195</sup>

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193. *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting) (“In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of ‘sex’ was discrimination because of a person’s biological sex, not sexual orientation or gender identity.”); *id.* at 1825 (Kavanaugh, J., dissenting) (“The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of ‘discriminate because of sex’ was the same in 1964 as it is now.”); *id.* at 1828 (“For phrases as well as terms, the ‘linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan.” (first quoting WILLIAM ESKRIDGE, *INTERPRETING LAW* 81 (2016); and then citing SCALIA, *supra* note 121, at 17)).

194. *See supra* note 193; *see also Bostock*, 140 S. Ct. at 1756–57 (Alito, J., dissenting) (noting that the majority opinion “‘proceed[s] on the assumption that “sex” . . . refer[s] only to biological distinctions between male and female.’ If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity”); *id.* at 1757 (“If ‘sex’ in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.”). *Compare id. with id.* at 1738–39 (majority opinion) (discussing ordinary public meaning).

195. *See id.* at 1769–73 (Alito, J., dissenting) (discussing anti-gay and anti-trans norms in society and under law); *id.* at 1828–29 (Kavanaugh, J., dissenting) (carefully delineating differences between sex and sexual orientation as a function of “language and psychology”

In different ways, the *Bostock* dissents acknowledge that their historically based readings of Title VII's sex discrimination rule reflect historically normative positions on what in an earlier day might have been referred to as "homosexuality" and "transsexualism."<sup>196</sup> On this level, the dissents do not affirm—contemporaneously—either the sameness or the equal dignity and worth of cisheterosexuals and LGBT persons. Practically, invoking historical determinants, they reject it.

In the course of the *Bostock* litigation at the Supreme Court, old and widely outmoded ideas of gay and trans difference and otherness—ideas that not only differentiated between and among cisheterosexuals and LGBT persons but that also abnormalized, even pathologized, gay and trans identities, and hence gay and trans people—achieved a certain degree of prominence.<sup>197</sup> Remarkably, if depressingly, though also not wholly unpredictably, these discriminatory lines underwrote defense positions in the cases *Bostock* resolves.<sup>198</sup>

This was especially true of the anti-trans claims that the *Bostock*

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as well as "history and sociology," while relying on ordinary understandings of sex discrimination to justify a heterosexually exclusive result in the case). As Justice Kavanaugh's dissent explains, it "does not separately analyze discrimination on the basis of gender identity, [but] this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity." *Id.* at 1823 n.1.

196. See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION* 43 (Robert Hurley trans., 1978) (1976) (discussing the historical emergence of "the homosexual" in a "famous article of 1870," and suggesting that "[h]omosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul," and concluding that "[t]he sodomite had been a temporary aberration; the homosexual was now a species"); Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies*, in *THE TRANSGENDER STUDIES READER* 1, 4 (Susan Stryker & Stephen Whittle eds., 2006) (describing the history of "the word 'transgender,'" and noting Virginia Prince's "[f]irst usage use of the term . . . to refer to individuals like herself whose personal identities she considered to fall somewhere on a spectrum between 'transvestite' (a term coined in 1910 by Dr. Magnus Hirschfeld) and 'transsexual' (a term popularized in the 1950s by Dr. Harry Benjamin)"). The *Bostock* majority opinion itself does not abandon the term "homosexuality." See, e.g., *Bostock*, 140 S. Ct. at 1737, 1741, 1742.

197. For discussion of the litigation that traces these lines, see generally Spindelman, *The Shower's Return: Part I*, *supra* note 9; Spindelman, *The Shower's Return: Part II*, *supra* note 9; Spindelman, *The Shower's Return: Part III*, *supra* note 9; Spindelman, *The Shower's Return: Part IV*, *supra* note 9; Spindelman, *The Shower's Return: Part V*, *supra* note 9; Spindelman, *The Shower's Return: Part VI*, *supra* note 9.

198. For some additional background, see generally Marie-Amélie George, *Framing Trans Rights*, 114 NW. U.L. REV. 555, 603–07 (2019) (tracing relevant aspect of debates about trans rights that played out in some ways in the *Bostock* litigation).

litigation involved. Defense arguments, along with often bolder arguments offered by different *amici*, characterized trans people, specifically trans women, as abnormal, violent, criminal, sexually predatory, and monstrous in ways that did not simply counsel not including anti-trans discrimination within Title VII's terms, but that also, more insidiously, sketched a line of thought that would call for re-imposing mental health and criminal controls on trans people in order to check the social threats that they wrongly—and disturbingly—were claimed inevitably to pose.<sup>199</sup>

If the good news is that the *Bostock* dissents do nothing expressly to endorse these ideas, they scarcely do anything expressly to disavow them.<sup>200</sup> (Nor for that matter does the Court's *Bostock* opinion, which simply lets them drop in the face of the pro-gay and pro-trans interpretation of Title VII that it issues.<sup>201</sup>) Nevertheless, within the dissents, florid, historical forms of anti-gay and anti-trans discrimination are fully legible and legally normative, if in a highly particular way: In the context of the cases that *Bostock* decides, those historical forms of anti-gay and anti-trans discrimination are deployed so as to explain why lesbian, gay, and trans people as such are not the beneficiaries of Title VII's sex discrimination ban. To that extent, anti-gay and anti-trans normativities are allowed to carry the day in the dissents as a matter of law, and are given legal and social space to persist and breathe as a result.

Seen this way, the *Bostock* dissents figure a conflict not only with the *Bostock* majority opinion, but also with the outlooks, holdings, and trajectories of the cases comprising Supreme Court's pro-LGBT constitutional rights jurisprudence.

This point has real jurisprudential stakes for the *Bostock* dissents,

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199. The arguments are carefully traced in the sources cited *supra* note 197.

200. For some related discussion in Justice Alito's dissent, see *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) (noting that the "Court dismisses questions about 'bathrooms, locker rooms, or anything else of the kind'"). The dissent shows some sympathy for some aspects of these defense and defense-minded positions in the case, including the idea that trans women may inflict "serious psychological harm" on "women who have been victimized by sexual assault or abuse," who may "experience . . . seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room" as injurious. *Id.* at 1779.

201. Or perhaps more precisely, it brackets some of them. See *id.* at 1753 (majority opinion) (discussing "sex-segregated bathrooms, locker rooms, and dress codes" and suggesting that their status under law, including Title VII, was not before the Court, which had not had "the benefit of adversarial testing about the meaning of their terms," and so concluding that the opinion does not mean to "prejudge any such question today").

including the textualist methods they embrace. Now that *Romer*, *Lawrence*, *Windsor*, and *Obergefell* are good and settled constitutional law, the dissents' positions—which legally endorse anti-gay and anti-trans normativities for purposes of construing Title VII in the present tense—are legally anomalous. It is these opinions—and not the *Bostock* majority opinion, as they claim—that broadly lack authoritative legal supports. Missing them, the *Bostock* dissents—and not the *Bostock* majority opinion—are properly viewed as both lawless and illegitimate at once.<sup>202</sup>

This is because, consistent with the Supreme Court's pro-LGBT constitutional rights jurisprudence, anti-gay and anti-trans prejudices are not to be treated as legally sound. They are not a proper basis for governmental action like the construction of a statute—at least not without some special justification beyond, as *Romer v. Evans* put it over a generation ago, “a bare desire to harm” members of a politically unpopular group, precisely what the *Bostock* majority opinion says gay and trans people were back when Title VII was enacted.<sup>203</sup> Without rejecting *Romer*, the *Bostock* dissents nevertheless flout its rule by authorizing widespread, intense prejudices against gay and trans people, such as they were understood and circulated in 1964, to supply the conditions for their present-day exclusion from the protections of Title VII's sex discrimination ban.<sup>204</sup> Neither of the dissents asks for—or gives—a justification beyond historical group-based animus before treating it as legally normative for purposes of their textualist inquiries

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202. The point as to the substance of constitutional law, derived from the Supreme Court's LGBT rights jurisprudence, is expressed in Spindelman, *Masterpiece Cakeshop's Homiletics*, *supra* note 108, at 381 (“Nothing may stop religious or moral views on the status of homosexuality from being expressed in the public arena, but those views, however else they circulate, cannot become the basis for anti-lesbian and anti-gay state action.”). The line from *Masterpiece Cakeshop* to the results in *Bostock* is sketched in *id.* at 406. *See also supra* note 42.

203. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (alteration in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))); *Bostock*, 140 S. Ct. at 1751 (“As . . . today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected.”).

204. The only citation to *Romer v. Evans*, 517 U.S. 620 (1996), in *Bostock* appears in Justice Kavanaugh's dissent, *Bostock*, 140 S. Ct. at 1833 (Kavanaugh, J., dissenting), where it is cited, apparently, approvingly.

and results.

The crux of the problem that the dissents thus both face but, in their own ways, otherwise refuse to meet, is that their textualist approaches to Title VII's sex discrimination rule lead them to endorse constructions of its terms founded in historical forms of anti-gay and anti-trans animus that are themselves now constitutionally out of bounds. Whatever the virtues of the textualist methods practiced by the *Bostock* dissents—their capacity, as Justice Kavanaugh's opinion says, to generate clear, fixed statutory meanings that enable the public to know what the law is, and that respects the Court's role in our constitutional and rule-of-law systems—they remain legally wanting.<sup>205</sup> They yield interpretations of Title VII that do not accord with basic U.S. law and its requirements. Without non-discriminatory reasons, they “tilt the scales of justice in favor of the strong or popular and neglect the [constitutional] promise that all persons are entitled to the benefit of the law's terms.”<sup>206</sup> Settled principles of constitutional justice foreclose these results.

Who can say why the dissents do not engage these problematics? They themselves do not. Though the problematics must register on some level, the dissents think them away in opinions that show themselves unprepared to affirm both the deep legitimacy and broad sweep of the authority of the Supreme Court's pro-LGBT constitutional jurisprudence.<sup>207</sup>

One prospect is that the dissents continue to think of the constitutional precedents as limited, substantive constitutional rulings that are only implicated in cases involving the adjudication of claims of

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205. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) (discussing rule-of-law and democratic accountability values).

206. *Id.* at 1751 (majority opinion). Indeed, as the Court's *Bostock* opinion itself flags, to pin Title VII's sex discrimination rule's meaning to the original public meaning in 1964 in principle raises questions about the legitimacy of doctrines developed in the intervening years on behalf of cisheterosexuals, mainly cisstraight women, that do not accord with a narrow understanding the original public meaning of the law. *Id.* at 1747, 1751–52.

207. Justice Kavanaugh's dissent's brief discussion and citation of the Court's pro-LGBT constitutional rights decisions indicates some meaningful fidelity to them, just not the kind of deep and abiding fidelity to them that they warrant in the context of a case like *Bostock*, along the lines reflected in the *Bostock* majority opinion. *Bostock*, 140 S. Ct. at 1833 (Kavanaugh, J., dissenting). How one might square a commitment to abiding by those decisions and the dissents' positions in *Bostock* is suggested *infra* in the text accompanying notes 208–09. For another perspective on what is happening in the dissents, see *id.* at 1773 (Alito, J., dissenting) (“According to the Court, an argument that looks to the societal norms of those times represents an impermissible attempt to displace the statutory language.”).

illicit state action—not cases involving extra-constitutional or sub-constitutional claims about the meaning of the outputs of the federal legislative process. This position may travel with, or be animated by, the thought that the Court’s pro-LGBT constitutional rights jurisprudence deserves respect to its limits, but no more, or that it must actually be circumscribed, so as to secure the blessings of faithful conservatives’ and traditional moralists’ liberties, including those of religious and traditional morality-minded employers who were not wholly unrepresented in the cases *Bostock* decides.<sup>208</sup> Whatever their reasons, the dissents effectively treat the Court’s pro-LGBT rights jurisprudence as bounded authority that does not speak to—or help determine—*Bostock*’s results.<sup>209</sup>

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208. See *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567–68 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019), and *aff’d sub nom. Bostock*, 140 S. Ct. 1731 (citations omitted) (noting that Stephens’s employer, “Thomas Rost[,] . . . has been a Christian for over sixty-five years” and “proclaims ‘that God has called him to serve grieving people’ and ‘that his purpose in life is to minister to the grieving’”); Brief for Petitioner at 5, *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019) (No. 18-107) (citations omitted) (reiterating that Rost has been “a devout Christian for more than 65 years, a former member of the deacon board at Highland Park Baptist Church, and a prayer leader at corporate events” and stating that the funeral home’s mission statement “confirms that the company’s ‘highest priority is to honor God in all that [they] do’”).

209. For the dissents’ engagement with religious limits in the cases, see, for example, *Bostock*, 140 S. Ct. at 1780 (Alito, J., dissenting) (noting amicus briefs “filed by a wide range of religious groups” “argu[ing] that ‘[r]eligious organizations need employees who actually live the faith,’ and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization’s faith forces the group to communicate an objectionable message” (quoting Brief for Nat’l Ass’n of Evangelicals et al., at 3, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107))); *id.* at 1823 n.2 (Kavanaugh, J., dissenting) (“As the Court today recognizes, Title VII contains an important exemption for religious organizations. The First Amendment also safeguards the employment decisions of religious employers. So too, the Religious Freedom Restoration Act of 1993 exempts employers from federal laws that substantially burden the exercise of religion, subject to limited exceptions.” (citations omitted)). For a fuller picture, see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018), reaffirming *Obergefell*, which Justice Alito joined. See also *id.* (“[G]ay persons . . . cannot be treated as social outcasts or as inferior in dignity and worth. . . . [T]he laws and the Constitution can, and in some instances must, protect them . . . . At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression[,] [a]s this Court observed in *Obergefell*.”); see also *id.* at 1747 (Thomas, J., concurring) (“[T]he fact that this Court has now decided [*Obergefell*] [does not] somehow diminish Phillips’ right to free speech. . . . *Obergefell* itself emphasized that the traditional understanding of marriage ‘long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.’” (citing *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015))). For pertinent observations from Justices Alito and Kavanaugh during oral arguments in *Fulton v. City of Philadelphia*, see Transcript of Oral Argument at 68–69, 80–82, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-

The limitations of this position come into view by indulging a counterfactual reconstruction of *Bostock*—as if the Supreme Court's pro-LGBT constitutional rights decisions did not exist. Then, the historical discriminations against lesbian women, gay men, and trans people the dissents treat as authoritative might broadly, anyway, be legally legitimate, and hence lawful, normative touchstones for readings of Title VII's sex discrimination rule that exclude anti-gay and anti-trans discrimination.<sup>210</sup>

This is, in fact, not simply a counterfactual, but a recollection of the historical situation of the Title VII sex discrimination decision reached in 1992 by the U.S. Court of Appeals for the Sixth Circuit in *Dillon v. Frank*, decided after *Bowers v. Hardwick* came down but before *Romer v. Evans* did.<sup>211</sup> Formally, *Dillon* involved the question whether Title VII's sex discrimination prohibition barred anti-gay sexual harassment.<sup>212</sup>

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123).

210. This point holds true even for Justice Kavanaugh's dissent, which presents its arguments in ways that seem calculated to make it seem hip to at least who lesbian women and gay men are, its position on trans people being more tempered and raising some active questions about what the opinion actually understands about Stonewall, which it invokes as a milestone historical event. See *Bostock*, 140 S. Ct. at 1828–29 (Kavanaugh, J., dissenting) (“[Treating sexual-orientation discrimination as sex discrimination] rewrites history. Seneca Falls was not Stonewall. The women’s rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both.”). On Justice Kavanaugh’s dissent’s treatment of trans people, they are submerged in a footnote as an extension of lesbians and gay men who are treated by the opinion “in much the same way.” *Id.* at 1823 n.1. The word “transgender” is not in the opinion, and the term “gender identity” is found nowhere beyond the dissent’s first footnote. This all is rounded out by the conclusion of the opinion which subtly and rhetorically reperforms a form of trans erasure aside from what is in its first footnote. The dissent concludes with a nod that “it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans,” “[m]illions” of whom “have worked hard for many decades to achieve equal treatment in fact and in law,” while “exhibit[ing] extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today’s result.” *Id.* at 1837. Against this, the silence about trans people in the opinion’s concluding paragraph is striking. Thanks to James Pfeiffer for productive engagement on this point.

211. See *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992). *Dillon* makes an appearance in Justice Alito’s *Bostock* dissent, *Bostock*, 140 S. Ct. at 1777 n.41 (Alito, J., dissenting), where it is cited as authority for “the positions of the EEOC.” *Id.* at 1777. *Dillon* deals with only one part of the relevant historical situation. For a wider perspective that includes aspects of the history of trans sex discrimination rights under Title VII, see, inter alia, Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII’s Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83 (2019).

212. See *Dillon*, 1992 WL 5436, at \*1, \*4 (rejecting a Title VII claim that anti-gay sexual harassment constituted sex discrimination on the ground that “only discrimination based on

Announcing that it did not, *Dillon* relied on then-conventional tools of statutory interpretation that more or less track the textualist lines of the *Bostock* dissents.

While *Dillon*, like *Bostock*, ventured no express constitutional argument in support of its result, the ruling bore the hallmarks of a decision that reflected and reinforced the spirit of its constitutional age—during *Hardwick*'s reign, in which legal difference, exclusion, othering, and state definition of the lives of LGBT persons was the order of the day.<sup>213</sup> In this era, the notion that lesbians and gay men and their intimacies were anything like heterosexuals and theirs, as epitomized, for instance, by the sacred bonds of traditional marriage, was often seen as *Hardwick* famously and awfully characterized it: “facetious,” a joke.<sup>214</sup> The broadly homophobic order in that moment, later reflected in the unprecedented and sweeping Colorado constitutional amendment that *Romer* struck down, involved the deep legal normativity—for some, a felt imperative—of pariahdom for homosexuality and the homosexuals who practiced it: criminalization of lesbian and gay intimacies, as in *Hardwick*, and hence, in important respects, a kind of criminalization of lesbians and gay men themselves, along with, as in *Romer*, their exclusion

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being male or female is prohibited by Title VII,” not “‘anything related to being male or female, sexual roles, or to sexual behavior’” (footnote omitted)). For one insightful contemporaneous account of how *Dillon* involved a misreading of Title VII, see Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 1–3, 12–13, 23–27, 31–32, 34, 38 (1992) (discussing *Dillon*).

213. For some perspective on the status of LGBT persons around the time of Title VII's enactment, see generally Brief for Historians as Amici Curiae Supporting Employees, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (discussing historical context around Title VII's enactment, and into the mid-1970's), and Edelman, *supra* note 20, at 553–56 (discussing events in 1964). For some historical context on state classifications of, and discrimination against, LGBT persons as offered as part of an argument for overturning *Bowers v. Hardwick*, see generally Brief for Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

214. *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986) (noting the country's history of criminal sodomy laws and stating that “[a]gainst this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation's history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious”); see also Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 435 (1997) (“‘I don't think about sex when I read *Hardwick* and I don't think about what sex acts are at issue. *I think how they hate me.*’” (quoting letter from William B. Rubenstein, Consulting Associate Professor, Stanford Law School (Nov. 11, 1996))); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987) (noting that “the majority resorted to a flippancy verging on contempt” when “it described Michael Hardwick's invocation of constitutional protection as ‘at best, facetious’”).



from the ordinary transactions and protections of public and private life.<sup>215</sup>

Much as the *Bostock* dissents' positions on the meaning of Title VII's sex discrimination ban are *Dillon*-like, they lack the supports that *Dillon* once had in wider constitutional and rule-of-law rules. The *Bostock* dissents are cut off from dominant constitutional positions—positions that, as *Bostock* indicates, now define what legal justice, as a rule-of-law concept and practice, means. Seen as only being out of step with constitutional justice requirements, the *Bostock* dissents' interpretations of Title VII's sex discrimination rule look like nothing so much as atavistic hangovers that are legally problematically prepared to tolerate anti-gay and anti-trans prejudices as the basis for law, including judicial decision-making.<sup>216</sup>

Whether they intend it or not, the *Bostock* dissents may yet function as symbolic beachheads—or rallying cries—from which those who remain opposed to LGBT equality gains under law may keep their dreams of legal revolution in a literal sense alive, aspiring to return to the days and ways of life of yore. Modestly, the dissents flag the prospect that future positive law changes in pro-LGBT directions must come not from the Supreme Court via extensions of its pro-LGBT constitutional jurisprudence, but through the actions of the political branches that heed its larger, rule-of-law teachings.<sup>217</sup> Without disagreeing that they should, consistent with the *Bostock* majority's teaching, what is misguided about

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215. For discussion of the Colorado constitutional amendment, see *supra* text accompanying notes 172–75. For an additional, relevant note on what that amendment did, see *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”).

216. See also *supra* note 145.

217. For expressions of conventional notions of Congress/Court principal/agent relations at work in the *Bostock* dissents, see, for example, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) (“Usurping the constitutional authority of the other branches, the Court has essentially taken [a proposed House bill’s] provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.” (footnote omitted)); *id.* at 1823–24 (Kavanaugh, J., dissenting) (“[O]ur role as judges is to interpret and follow the law as written . . . . If judges could rewrite laws based on their own policy views, . . . the critical distinction between legislative authority and judicial authority . . . would collapse . . . [and] the Judiciary would become a democratically illegitimate super-legislature . . . .”). Cf., e.g., SCALIA, *supra* note 121, at 9, 13, 17, 38 (discussing principal-agent notions in different ways).

the dissents is their embrace of historical anti-gay and anti-trans normativities, which they find legitimate in the present tense, and as the basis for Supreme Court decision-making now. From a constitutional perspective, and, after *Bostock*, from a rule-of-law perspective as well, the dissents' positions are outliers that express a minority view on what constitutional justice and now legal justice demand—even on the current Supreme Court.<sup>218</sup>

### B. *Some Unanswered Questions*

For everything it does and for all the legal ground that it occupies, *Bostock* remains an unfinished project. With Justice Kavanaugh's dissent, *Bostock*'s "implications . . . will likely reverberate . . . for years to come" as its meaning is tested and clarified.<sup>219</sup>

The questions *Bostock* raises are large, challenging, and consequential. Without attempting to resolve them, here are but a few of the more prominent questions it prompts, which lower courts, legislators, and executive officials have already begun to grapple with in different ways.

Does *Bostock*'s holding that anti-gay and anti-trans discrimination are always and necessarily sex discrimination under Title VII—particularly given the constitutional supports beneath this ruling—mean that the Supreme Court's constitutional precedents involving sex discrimination rights are also now to be interpreted in parallel ways?<sup>220</sup> If

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218. See *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (reaffirming *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage" (citing *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015))); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (reaffirming *Obergefell*); see also *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (vindicating *Obergefell*'s principle in the case of a same-sex couple but without citing *Obergefell*). For how this point ties into the prospects that *Bostock* may be understood as a decision that results from a constitutional avoidance canon, see *supra* note 184.

219. *Bostock*, 140 S. Ct. at 1836–37 (Kavanaugh, J., dissenting); see also *id.* at 1783 (Alito, J., dissenting) ("Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.").

220. Justice Alito's *Bostock* dissent notes dimensions of this prospect. *Id.* at 1783 (Alito, J., dissenting) ("Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a 'heightened' standard of review is met. By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review." (citations omitted)). For a related thought in Justice

anti-gay discrimination and anti-trans discrimination are recognized as constitutionally prohibited sex discrimination, what would this mean for, and do to, the Court's pro-LGBT constitutional rights jurisprudence? Should the rulings in cases like *Romer*, *Lawrence*, *Windsor*, *Obergefell*, along with the rights that they involve, be reconfigured as constitutional sex discrimination decisions involving constitutional sex equality rights?<sup>221</sup> Will the Supreme Court yet recognize that lesbian, gay, and transgender equality is integral to the project of achieving sex equality, and with it the elimination of cisheterosexual male dominance and the ideologically driven hierarchy of cisstraight men over cisstraight women that has long gone with it?<sup>222</sup> Does *Bostock* prefigure a future governed by a new, integrated track for the different types of sex discrimination rights it has started to recognize, or will *Bostock* be the inaugural move

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Kavanaugh's dissent, see *id.* at 1833 (Kavanaugh, J., dissenting) ("All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause.").

221. Cf. generally Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97 (2005); MacKinnon, *supra* note 153.

222. A few of the sources that could be cited here include MacKinnon, *supra* note 153 (making the argument in the context of a discussion of *Lawrence v. Texas*, while tracing earlier, foundational work along these lines); Spindelman, *Gay Men and Sex Equality*, *supra* note 76 (treating the relationship between gay male sexuality and sex equality, including male supremacy and cisheterosexual male/cisheterosexual female hierarchy). Additional sources that fill out the account of anti-gay and anti-trans discrimination as sex discrimination in different ways include I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991) (arguing sexual orientation discrimination is sex discrimination under Title VII); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 58–60 (1995) (discussing sexual orientation discrimination as sex discrimination under a Title VII sex stereotyping claim); Koppelman, *supra* note 76 (offering various accounts for why anti-lesbian and anti-gay discrimination are forms of sex discrimination); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1777–78 (1998) (arguing that anti-gay discrimination is sex discrimination consistent with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), described as "instruct[ing]" that "imposing pressure to conform to preconceived notions of appropriate manhood or womanhood at work is the essence of differential treatment 'because of sex' within the meaning of Title VII"); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 18 (1995) (discussing the "sexual orientation loophole" to claims of sex discrimination); Brief for Anti-Discrimination Scholars as Amici Curiae Supporting the Employees at 14–16, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (arguing that anti-trans discrimination "also punishes men and women for departing from traditional gender roles").

in a second, supplemental line of constitutional and rule-of-law rights that LGBT persons may pursue when they are subject to discrimination?<sup>223</sup>

What might this mean for the standards of review to be applied in cases adjudicating anti-LGBT discrimination involving LGBT classifications? Will the standard of review be what the LGBT constitutional rights cases have so far indicated, something like heightened rational basis review with serious bite?<sup>224</sup> Or will it be the near-strict, but formally intermediate scrutiny standard of *United States v. Virginia* and subsequent cases?<sup>225</sup> Could the standard of review for anti-LGBT claims be different depending on which doctrinal path for analyzing anti-LGBT discrimination parties invoke and courts pursue?

Relatedly, how will these constitutional matters map onto what *Bostock*'s rule-of-law ideal of legal justice requires? Accepting that *Bostock* demands a presumption of strict legal equality between LGBT and non-LGBT persons, exactly how strong will countervailing interests

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223. A very loose analogy is found in the Supreme Court's "right-to-counsel"/"self-incrimination" doctrines, as discussed in Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L. J. 387, 407 (2001) (noting that "[t]he Warren Court 'could have developed *Escobedo v. Illinois*, 378 U.S. 478 (1964)], into a doctrine . . . mandating that no waiver of rights would be accepted unless the accused had first consulted with counsel," but then observing that *Miranda v. Arizona*, 384 U.S. 436 (1966), "cut off that possibility . . . by continuing to move in the same general direction but 'switching tracks'—moving from a right to counsel rationale to a self-incrimination rationale, one which allowed the police more room to maneuver"). Thanks to Joshua Dressler for engagement on this point.

224. See Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1529 (2004) (describing how, in the wake of *Lawrence v. Texas*, "the extreme deference of old-fashioned rational basis review has now been complicated by the Court's recognition that at least some adverse treatment of gay people is invidious and disfavored," while noting that Justice O'Connor's concurrence suggested "two tiers of rational basis review as well," and anticipating that inquiries into differentiation based on sexual orientation would require an aspect of heightened scrutiny); Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447, 1449–50, 1461–62 (2004) (noting how *Lawrence v. Texas* and *Romer v. Evans* "sidestep[ped]" the "conventional doctrinal framework" of strict scrutiny and rational basis review, and suggesting that "cases about sexual orientation may transform" the "modern framework on heightened scrutiny," perhaps toward a future "in which tiered scrutiny no longer operates mechanically" and scrutiny is more "contextual and incremental"); Jane S. Schacter, *Obergefell's Audiences* 77 OHIO ST. L.J. 1011, 1016 (2016) ("While *Obergefell* made no reference to standard of review, did it nevertheless plant the seeds for heightening scrutiny for purposes of equal protection analysis at a later point?").

225. 518 U.S. 515, 532–34 (1996) (describing the heightened standard of review for laws that classify by sex); see also *Bostock*, 140 S. Ct. at 1783 (Alito, J., dissenting) (anticipating future arguments that that heightened standard of review applies to anti-gay and anti-trans discrimination); *id.* at 1832 (Kavanaugh, J., dissenting) (discussing the Court's "rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex").

have to be for that presumption to yield? Is skepticism grounded in an ideal of legal justice practically looking for rational reasons beyond traditional justifications for anti-LGBT discrimination or for “important” or “exceedingly persuasive” ones?<sup>226</sup> Is *Bostock* a hint that the Supreme Court will, at last, formally announce sexual orientation and trans identity classifications are inherently suspect, or at least quasi-suspect, in a classic *Carolene Products* sense?<sup>227</sup>

What might all this mean for the questions that *Bostock* explicitly brackets about the meaning of sex discrimination under other federal and state statutes? About how to resolve regularly transphobically inspired claimed conflicts between cis and trans women in private, sex-segregated spaces like bathrooms, showers, and locker rooms?<sup>228</sup> About how religious and traditional moral liberty claims should be handled when they conflict with statutory sex discrimination rights?<sup>229</sup> It is no surprise that a number of lower courts have already started following *Bostock*'s clearly pro-LGBT cues in the direction of expanding statutory sex discrimination protections for trans people under other federal laws, but it remains to be seen whether *Bostock*'s radiations will cross-cut, as *Bostock* suggests they may be, in the face of religious and traditional moral liberty claims.<sup>230</sup>

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226. *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (noting the standard of review, including “important governmental objectives”); *Virginia*, 518 U.S. at 532–34 (same, including “exceedingly persuasive justification”).

227. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”). The decision in *Ray v. McCloud*, No. 2:18-cv-272, 2020 WL 8172750, at \*1, \*8 (S.D. Ohio Dec. 16, 2020), “find[ing] that transgender individuals are a quasi-suspect class entitled to heightened scrutiny” under the Equal Protection Clause, is certainly in keeping with this understanding of *Bostock*, which the opinion cites. *Id.* at 8 n.9.

228. *See Bostock*, 140 S. Ct. at 1753 (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us . . .”); *see also* Ronan, *supra* note 182 (tracking state anti-LGBTQ bills, many of which are anti-trans).

229. *See Bostock*, 140 S. Ct. at 1754 (“[H]ow these doctrines protecting religious liberty interact with Title VII are questions for future cases too.”).

230. *See supra* notes 180, 182. For a particular inflection of these cross-cutting impulses in the context of a First Amendment academic freedom claim, see *Meriweather v. Hartop*, No. 20-3289, 2021 WL 1149377 (6th Cir. Mar. 26, 2021) (recognizing First Amendment protections in academic setting in case involving professor’s treatment of a trans student). Critical commentary on *Meriweather* is in Andrew Koppelman, *Abuse As a Constitutional*

Recognizing the generally expansive, pro-LGBT possibilities that *Bostock* opens up, it may still prove to be an accurate prediction that *Bostock*'s "reasoning . . . suggests that [the] victory [in the case] will be limited in significant ways in the near future," including by "another statute, the Religious Freedom Restoration Act, [which] might prevent Title VII from prohibiting discrimination by employers who have religious objections."<sup>231</sup> But if *Bostock*'s constitutional underpinnings and their own rule-of-law legal justice extensions are treated as the deep and far-reaching legal norms that they imply they are, analysis in future cases where *Bostock*'s pro-LGBT protectionism conflicts with religious and traditional moral liberties should be more challenging than *Bostock*'s reservations on the question, on their own, might be thought to suggest.<sup>232</sup>

Tied into not only the Supreme Court's pro-LGBT constitutional jurisprudence, but also implicating the Supreme Court's even more longstanding constitutional sex discrimination rules, it can hardly be a *fait accompli* that Title VII's sex discrimination protections—or the protections found in similar federal measures—will be limited in the face of claims under the federal Religious Freedom Restoration Act.<sup>233</sup> Well-established precedents in the constitutional sex discrimination arena—themselves broadly synced with other constitutional equality concerns, most famously based on race—reject traditional religious and moral views and values as legitimate constraints on cisheterosexual women's

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*Right: The Meriweather Case*, THE HILL, (Apr. 15, 2021), <https://thehill.com/opinion/judiciary/546444-abuse-as-a-constitutional-right-the-meriwether-case> [https://perma.cc/MJ9A-7WRA], and Darren Rosenblum, *Misgendering Students Is Not 'Academic Freedom.' It's an Abuse of Power*, WASH. POST (Mar. 31, 2021, 9:00 AM), <https://www.washingtonpost.com/opinions/2021/03/31/misgendering-students-is-not-academic-freedom-its-an-abuse-power/> [https://perma.cc/GT4T-WCAC]. The contours of some of these conflicts are a bit clearer now that *Fulton v. City of Philadelphia*, No. 19-123, 2021 WL 2459253 (U.S. June 17, 2021), has been handed down, just as this work goes to press. How *Fulton* relates to the ideas developed in these pages will have to await another day.

231. Leah Litman, *Progressives' Supreme Court Victories Will Be Fleeting*, THE ATLANTIC (July 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/court-gave-progressives-hollow-victories/614101/> [https://perma.cc/U8CL-JJ3Z].

232. And even more challenging still if one takes account of the position set forth in Velte, *supra* note 182, at 2662 (arguing that the Nineteenth Amendment should be understood as a tool for "[d]efeating" LGBT religious exemption claims).

233. *Bostock*, 140 S. Ct. at 1754 (discussing the Religious Freedom Act and calling it a "kind of super statute" that "might supersede Title VII's commands in appropriate cases"). For a view of Title VII itself as a kind of "bedrock statute," see Eskridge & Ferejohn, *supra* note 116, at 1238.

sex discrimination rights.<sup>234</sup> Why should LGBT rights as sex discrimination rights be any different? After *Bostock*, could they be?

Of course, *Bostock*'s formal evasion of the constitutional underpinnings that support it may help, to some degree, to load the dice in the next generation "culture war" cases that already are, and otherwise are likely to be, coming down the pike. The evasion makes it somewhat easier for the Supreme Court—if it chooses to—to stick with *Bostock*'s textualist self-description and portray the conflicts in future cases as involving merely dueling statutory interpretation and conflict plays. One item worth tracking as the caselaw unfolds is whether rulings in these cases come at the expense of *Bostock*'s legal justice promises, with their constitutional justice supports. In theory anyway, they should not be readily sacrificed.

Particularly not since *Bostock*, despite the ostensible judicial humility of its leading textualist self-portrait, shows the Supreme Court is no ordinary servant of the nation's lawgivers, but their "Ruler" as well.<sup>235</sup> Having achieved the ground that it does in *Bostock*, there is no simple way for the Supreme Court to abandon it without effectively practicing constitutional and rule-of-law retrenchment. This may not be difficult as a conceptual or practical matter, though it may prove more challenging, as *Bostock* and other recent cases show, than a conservative Justice might like on prudential or principled legal grounds.<sup>236</sup>

What is more, *Bostock* makes the arguments for limiting constitutional and rule-of-law rights for LGBT persons harder to defend

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234. See Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 915, 918, 952 (1983) (noting that "[t]he subordination of women has traditionally been justified by arguments drawn from biology or nature, in turn often equated with divine command," and noting Supreme Court doctrinal developments); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 2 (1975) (describing the "traditional attitudes and legal regulation" toward women in "Anglo-American literature and case reports" whose "strains are echoed even to this day": "First, women's place in a world controlled by men is divinely ordained; second, the law's differential treatment of the sexes operates benignly in women's favor"). For one example of white supremacy's claimed religious underpinnings, plainly repudiated by the Supreme Court, see *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

235. *Bostock*, 140 S. Ct. at 1753 ("[T]he same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them."); *Obergefell v. Hodges*, 576 U.S. 644, 713 (Scalia, J., dissenting) ("Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.").

236. See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133–42 (Roberts, C.J., concurring) (emphasizing prudential considerations).

than they otherwise might have been. *Bostock* advertises that the risks of not continuing the principled pro-LGBT jurisprudential project include creating needless legal uncertainty about constitutional and rule-of-law positions that the Court has already staked out. The questions that *Bostock* leaves future Court decisions to struggle with, too, themselves belie *Bostock*'s textualist claim to be a "simple," "straightforward" ruling.<sup>237</sup> *Bostock* is the "momentous" ruling it itself touts—but in ways that far exceed the momentousness of its textualist statutory interpretation self-account.<sup>238</sup>

#### IV. CONCLUSION

You may think *Bostock* is more or less problematic for being the paradoxical, multifaceted, and far-reaching decision that it is. Whatever else it is, *Bostock* is not—as the dissents portray it—up to any conventional game of statutory updating unmoored to anything but judicial preference, or will, or the national mood bereft of legal authority beneath it.<sup>239</sup>

Affirmatively, *Bostock* is a decision that offers instruction about the judicial processes that have been engaged and deployed as part of the efforts to overcome historical and still-ongoing practices and norms in society and law of anti-lesbian, anti-gay, and anti-trans discrimination—discrimination that, as the *Bostock* dissents show, has been, and remains, a meaningful dimension of the fabric of American law and life. Like the larger political struggles to which *Bostock* is related, the play in the Court's opinion in the case, adjudicating disputes that are bound up with processes of legal, social, and cultural transformation, is complex,

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237. *Bostock*, 140 S. Ct. at 1741 ("simple"); *id.* at 1743 ("straightforward").

238. *See id.* at 1741.

239. *See Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting) (*Bostock* "actually represents . . . the theory that courts should 'update' old statutes so that they better reflect the current values of society. If the court finds it appropriate to adopt this theory, it should own up to what it's doing." (citations omitted)); *id.* at 1761 ("By proclaiming that sexual orientation and gender identity are 'not relevant to employment decisions,' the Court updates Title VII to reflect what it regards as 2020 values."); *id.* at 1835 (Kavanaugh, J., dissenting) ("The majority opinion insists that it is not rewriting or updating Title VII, but instead is just humbly reading the text of the statute as written. But that assertion is tough to accept."). *But see* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring) ("I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted."). *See also supra* note 42.



paradoxical, messy, and inconsistent, not a pure specimen of the legal arts, including the judicial craft.

Is *Bostock* a textualist decision? Yes. Does it involve the negation of textualist precepts? Also yes. Does the negation of its textualism reframe and refract that textualism in new and different light? It does. Can a judicial opinion be textualist and anti-textualist, and non-textualist-but-still-textualist at the same time? By means of the leading theories and conventional thinking on the subjects, no. And yet, despite what these theories and conventional ideas tell us about what should be, and even can be, here is *Bostock* in the wilds of the law, being the improbable thing it should not—and cannot—be. Draw your battle lines if you want. Insist that *Bostock*'s “real” truth is to be found in either its textualism or its anti-textualism in simple terms. Or on some other equally simple, consistent grounds. If forced to pick, I know which grounds I would choose. Do you?

Confronted with the stylized legal situation that *Bostock* manifests, there is something that feels—no, that *is*—incredibly real, even rich, delightful, and joyful about finding conceptual complexity and theoretical messiness in a judicial text like this. If we can resist the impulses to simplify and conceptually tidy *Bostock* up, and also the impulse to take it or parts of it down, there is a small chance we might begin to marvel at the beauty in its humanity, in its complexity, its paradoxes, its contradictions, its rivenness, its confidence, its sensitivity, its evasions, its trickiness, its truth-telling, its phenomenology, its question-begging, some or all of which may seem—if you want to insist on seeing matters this way—like deep textual imperfections.<sup>240</sup> Law being a complex and imperfect product of our complex, imperfect, dynamic, social multiverses, why should legal opinions be any different? How could law fully transcend its social determinants like that? Was it not onward a century ago that we supposedly moved past the idea of law as inhabiting a “special heaven . . . [of] absolute purity, freed from all entangling alliances with human life”?<sup>241</sup>

*Bostock* is an opinion that is deeply committed to its own textualist

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240. This is not to imagine unqualified acceptance of messy rulings because they are messy, of course, any more than it is to suppose anyone unqualifiedly accepts rulings that are perfectly conceptually simple and neat because they are simple and neat.

241. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935); see *id.* at 811, 811 n.7 (talking about “[l]awyers trained by long practice [to] . . . believ[e] what is impossible,” and quoting then citing LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 81 (1871)).

identifications, but not so resolutely that it loses its sense of the purposes of the larger legal project—and processes—that it is practicing, and the responsibilities of governance that courts, especially the Supreme Court, undertake to try to keep law from reducing to discriminatory power politics.

Not without complications or future conditions, and not beyond critique from across the political spectrum, *Bostock* will undoubtedly make the lives of lesbian, gay, and trans workers in the U.S. both just a little more equal, and, frankly, easier, less dominated by the vicissitudes of homophobia and transphobia, and the complex ways they can lead a self to live and be at work, as in the remainder of life. This is why some people, again, wept tears of joy on first reading *Bostock*'s text.

This complex victory—part textualist, part anti-textualist, and differently textualist in its anti-textualism; part statutory interpretation, part justice-doing related to constitutional governance through an expansion of constitutional rules into rule-of-law legal justice terms—will not be the last word on the ways in which workplace equality and freedom from discrimination function as workplace management tools. *Bostock*'s benefits, such as they are, track chiefly for those workers who can get and keep qualifications that otherwise qualify them to get and keep their jobs.

This is no small matter. In the current, extended moment—with millions struggling to get and pay for an education, much less an adequate or equal one, many living, struggling, out of work, on meager and inadequate unemployment benefits that leave them wondering if they can get and keep a roof over their heads and food in their own and sometimes loved ones' mouths and bellies—it is hard not to keep the victory *Bostock* represents in perspective.<sup>242</sup> Then, too, clear in this mix are the ways that

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242. See Kevin Carey, *What About Tackling the Causes of Student Debt?*, N.Y. TIMES: THE UPSHOT (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/upshot/student-debt-forgiveness-biden.html> [<https://perma.cc/7ANQ-AJRK>] (noting the \$1.7 trillion in “American outstanding student loan debt” and a “recent report . . . that the wealth gap between Black and white recent college graduates increased by over 50 percent from 2000 to 2018, in part because of higher borrowing by Black students”); Diane Coyle, *Working Women of Color Were Making Progress. Then the Coronavirus Hit.*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/14/opinion/minority-women-unemployment-covid.html> [<https://perma.cc/3HHQ-SG5V>] (noting that women of color suffered distinctive losses of total jobs lost in December 2020); Sydney Ember, *Unemployment Claims Rise Sharply, Showing New Economic Pain*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/14/business/economy/unemployment-claims.html?searchResultPosition=1> [<https://perma.cc/F9Z3-M35J>] (noting unusually high “initial claims for state unemployment

cisheterosexuals who authored and joined *Bostock* and its dissents remain, even after the decision has come down, the normative reference points for who is to get rights under Title VII's sex discrimination law and law in a wider sense.<sup>243</sup>

Though *Bostock* opens the door to future changes that strike me, and maybe you, too, or maybe not, as for the political good, it still achieves what it does while casually proceeding from subject and ideological positions—as cisheterosexuals and about cisheterosexuality—that the cases collected under its name challenge in different ways. These are subject and ideological positions that still provisionally buy into bio-sex definitions from the opinion's start to its end.<sup>244</sup> These are subject and ideological positions that repeatedly express self-referential concerns about what refusing the pro-gay and pro-trans sex discrimination claims here would mean for cisheterosexuals.

For the time being, then, we continue with cisheterosexuals legally governing a basically cisheteronormative way of American life that, cueing applause, has thankfully yielded an opinion allowing lesbian women, gay men, and trans people access to this way of life on terms we did not set and may not fully endorse, but anyway find ourselves practically having to live. Where is the meaningful alternative that can presently be produced to scale?

So, I for one am happy about *Bostock*'s paradoxicality, its confusions, its messiness, and even its sometimes labyrinthine qualities. They show *Bostock*'s relation to humanity, and its own queerness, a foundationless ground from which to achieve a detached, and persistently critical perspective on the ruling. In practices of messiness like this—where identity-based boundaries are perfectly clear, then not, where boundaries rule and then suddenly yield, where realities and appearances are clear until, upon examination, they become manifestly confused, even confusing—some people's political dreams for living today and

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benefits" compared to historical benchmarks); Nikole Hannah-Jones, *The Resegregation of Jefferson County*, N.Y. TIMES MAG. (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html> [https://perma.cc/WAM8-2RWR] (detailing a "wave of resegregation" in American schools, particularly across the South, and a corresponding delivery of "inferior resources" to "segregated black schools").

243. Accord Ho, *supra* note 158 (manuscript at 74–88).

244. For a still-significant discussion of the problematicness of this position within the Supreme Court's sex discrimination jurisprudence, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

tomorrow begin.<sup>245</sup> The complex identifications of the Supreme Court's *Bostock* opinion may yet be a sign that other complex social identities and ways of living—of being in the world—may someday find more of a home in the law than they now receive. If, to be clear, that is what folks are after.

To be sure, not everyone is.

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245. For one germane take on queerness, see Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7, 38, 51 (2004) (describing sexuality as “dark, unknown to us, riven by paradox and reversal,” and suggesting that queer theoretic work tends toward an irrationalism that “seeks and values paradox, contradiction, catachresis, and crisis”). Cf. Delmore Schwartz, *In Dreams Begin Responsibilities*, IOWA REV., Fall 2014, at 163; WILLIAM BUTLER YEATS, *Responsibilities*, reprinted in THE POEMS 99 (Scribner 1997) (“In dreams begins responsibility.”). I thank James Pfeiffer for the lead on the Yeats.